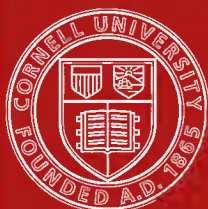


BARRISTER-AT-LAW

AN ESSAY
ON THE LEGAL POSITION
OF
COUNSEL IN ENGLAND

J. R. V. MARCHANT



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AN ESSAY ON THE LEGAL POSITION OF
COUNSEL IN ENGLAND

BY

JAMES ROBERT VERNAM MARCHANT, M.A.

OF GRAY'S INN AND THE OXFORD CIRCUIT, BARRISTER-AT-LAW,
FORMERLY SCHOLAR OF WADHAM COLLEGE, OXFORD

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TO
THE RIGHT HONOURABLE
BARON BRAMPTON
EMINENT ALIKE AS ADVOCATE
AND AS JUDGE
THIS ESSAY IS
GRATEFULLY DEDICATED
BY THE AUTHOR

PREFACE.

THE object of the following pages is to bring together the different authorities which define the legal position of a barrister in England. There is, it is believed, no work in which the law governing the profession of a barrister has been treated as a whole, nothing in England which corresponds to M. Cresson's "Profession d'Avocat" in France. While there are several text-books on the law relating to solicitors, and while much has been written on legal *ana* and on the antiquities and history of the Inns of Court, the law relating to the Bar has not yet formed the subject of any one treatise. If a student wished to find out the law of the profession which he might be about to enter, he would have to consult in turn several different works, for the law that governs the Bar belongs partly to the law of procedure and evidence, and partly to the law of trusts, and partly to the law of contract and tort; even if text-books on all these heads were consulted, the student would find that he had not exhausted the field of his study, for beside the case law and statute law on the subject, there is a not inconsiderable body of unwritten law, consisting of customs, rules, and usages, which are binding on the profession and are well understood within its limits, but few of which had ever been authoritatively recorded before the foundation of the Bar Committee and its successor, the Bar Council

The opinions given and published by the one or the other of those bodies have done much to clear up doubtful points and to define what was formerly vague. Of these opinions considerable use has been made in the following pages, in which an attempt has been made to collect not only the case law and statute law which affect the Bar, but also the most important usages of the profession, so far as they have been noticed by the Courts or interpreted by the Bar Committee or the Bar Council.

It is hoped that this essay may prove useful both to those within and to those without the profession. In dealing with a new subject many mistakes must needs be made, and the author will be grateful to the members of the profession who will call his attention to any.

The author wishes to thank the Executive Committee of the Bar Council for their permission to print the Retainer Rules and the Council's resolutions relating to their construction; he cannot adequately express his obligation to his friend Mr. John Raymond for many valuable hints and suggestions and for much kindly criticism.

J. R. V. MARCHANT.

3, PAPER BUILDINGS, TEMPLE,
Christmas, 1904.

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BARRISTER-AT-LAW.

AN ESSAY ON THE LEGAL POSITION OF COUNSEL IN ENGLAND.

CHAPTER I.

LEGAL PRACTITIONERS IN ENGLAND.

A LEGAL practitioner in England at the present day must belong to one or other of the following classes: barristers, solicitors, notaries public, conveyancers, special pleaders, draftsmen in equity, and parliamentary agents (*a*). Barristers derive their authority to practise from one of the four Inns of Court; so also do conveyancers, special pleaders, and draftsmen in equity. Solicitors are admitted by the Master of the Rolls and their names are then entered on the roll of solicitors which is kept by the Incorporated Law Society (*b*).

Notaries public derive their authority to practise from the Court of Faculties of the Archbishop of Canterbury (*c*).

(*a*) Persons who on August 25th, 1857, had been admitted advocates in any of the ecclesiastical courts in England had by the Court of Probate Act, 1857 (20 & 21 Vict. c. 77, s. 41), the right to practise as if they had been barristers; this class of advocates is now almost extinct.

(*b*) 51 & 52 Vict. c. 65, ss. 5 and 10. From and after November 2nd, 1874, the name "solicitor" was substituted for that of "attorney" and "proctor."

(*c*) Brooke's "Notary," 6th ed., 17.

Solicitors, conveyancers, special pleaders, draftsmen in equity, and notaries public have to take out annual certificates authorising them to practise (*a*). No certificate is required for a barrister to practise.

Barristers and certificated solicitors, notaries public, conveyancers, special pleaders, and draftsmen in equity are the only persons in England who are allowed "for or in expectation of any fee or reward to draw or prepare any instrument relating to real or personal estate or any proceeding in law or equity" (*b*).

Any person may practise as a parliamentary agent in the House of Lords, but in the House of Commons a parliamentary agent must sign a declaration and be registered in a book kept in the Private Bill Office (*c*).

(*a*), Stamp Act, 1891 (54 & 55 Vict. c. 39, ss. 43 and 47).

(*b*) Stamp Act, 1891, s. 44. The section does not extend to any public officer drawing or preparing instruments in the course of his duty, or any person employed merely to engross any instrument or proceeding. "Instrument" in the section does not include (*a*) a will or other testamentary instrument, (*b*) an agreement under hand only, (*c*) a letter or power of attorney, (*d*) a transfer of stock containing no trust or limitation thereof.

(*c*) Clifford, "History of Private Bill Legislation," ii. 880; Erskine May, "Parliamentary Practice," 691.

CHAPTER II.

THE INNS OF COURT.

THE word barrister is the name of a rank which can only be conferred in England by one of the four Inns of Court, viz. Lincoln's Inn, the Inner Temple, the Middle Temple, and Gray's Inn. The four Inns of Court are voluntary unincorporated societies (*a*) which are independent of the state and of each other, but which act together in providing for the legal education and examination of students, and in defining the conditions on which the rank of barrister is conferred. Each Inn of Court holds property which is vested in trustees by a series of successive conveyances (*b*); the property is bound by a trust of a public nature (*c*). The members of each Inn of Court are divided into three classes: students, utter barristers, and benchers. The students are those members of the Inn who have not been called to the bar, but who have an inchoate right to be called to the bar on complying with the conditions which the four Inns have imposed. A student who is qualified to be called to the bar, may, with the permission of the benchers, practise "under the bar" as a conveyancer, special pleader, or equity draftsman; such permission is granted for one year only but may be renewed annually (*d*). Utter barristers (*e*)

(*a*) *Booreman's Case* (1642), March, 177; *Cunningham v. Wegg* (1787), 2 Bro. Ch. Ca. 240; Report of the Inns of Court Commissioners, 1855, 3. See *Smith v. Kerr*, 1900, 2 Ch. 511; 1902, 1 Ch. 774.

(*b*) See Kyd on Corporations, 7.

(*c*) *Smith v. Kerr*, v.s.

(*d*) "Consolidated Regulations of the Four Inns of Court" (April, 1903), s. 25, *post*, p. 153.

(*e*) *I.e.* outer barristers, as to the origin of the name, see "Black Books of Lincoln's Inn," I. ix.

are those members of the Inn who have been called to the bar, but who have no share in the government of the Inn. The benchers are the governing body of the Inn, and fill up vacancies in their number or add to their number by co-opting barristers who are members of the Inn. The benchers alone have the right to determine whether they will at any time fill up vacancies or add to their number by a fresh election; they have the right to determine what persons shall be admitted as students, and what students shall be called to the bar; but while a student has an inchoate right to be called to the bar on complying with the conditions which the four Inns have imposed, no barrister has any inchoate right to be elected a bencher; even if a barrister has been proposed by one bencher, and seconded by another for call to the bench, the benchers may refuse to elect him, and need assign no reason for their refusal (*a*). The benchers form a domestic tribunal, with jurisdiction to inquire into the fitness of persons to be admitted as students, or of students to be called to the bar, and into the professional conduct of barristers who are members of the Inn (*b*). No member of an Inn of Court can retire from the society except with the consent of the benchers of his Inn and after compliance with the conditions which they impose (*c*). A barrister, as long as he is in practice, is subject to the supervision of the benchers of his Inn (*d*); it follows, therefore, that a barrister who retires from the membership of his Inn, without being or becoming a member of another Inn, cannot continue to practise as a barrister (*e*). A barrister can only cease to be a barrister by being disbarred by the benchers of his Inn. A barrister is sometimes disbarred on his own petition, as, for instance, in order to become a

(*a*) *Fry's Case* (1689), see *Hayward's Case*, 89.

(*b*) *Per* Lord Wynford, in *re Justices of the Court of Common Pleas at Antigua* (1830), 1 Knapp, 267; *Seymour v. Butterworth* (1862), 3 F. & F. 381; *Hudson v. Slade* (1862), 3 F. & F. 404.

(*c*) *Neate v. Denman* (1874), L. R. 18 Eq. 127.

(*d*) *Seymour v. Butterworth* (1862), 3 F. & F. 381.

(*e*) See *Neate v. Denman* (1874), L. R. 18 Eq. 127.

solicitor, for a barrister cannot be put on the roll of solicitors (*a*), or serve as an articled clerk for the purpose of being admitted a solicitor (*b*), without being first disbarred on his own petition. Disbarring, when a barrister does not petition to be disbarred, is a punishment inflicted by the benchers on a barrister whom the benchers sitting as a domestic tribunal adjudge guilty of conduct unbecoming his profession (*c*). When the benchers of an Inn punish a barrister by disbarring, they must, it seems, assign a reason for their action. Besides the power of disbarring a barrister the benchers have also the power of disbenching one of their own number (*d*), but if they disbench as a punishment, they must, it seems, assign a reason for their action.

The decisions of the benchers are not subject to review in any Court of Justice, but an appeal from them lay, before the Judicature Act, 1873, to the Lord Chancellor and the judges of the superior courts of common law, and now lies to the Lord Chancellor and the judges of the High Court of Justice (*e*) sitting as a domestic tribunal. All the power which the Inns of Court have concerning admission to the bar and the disbarring of barristers is said to be delegated to them from the judges, and the decisions of the benchers are in consequence subject to the control of the judges as visitors (*f*).

A mandamus will not lie to the benchers of an Inn to call a student to the bar, for the proper mode of relief in case of a refusal is by appeal to the judges as visitors (*g*). Nor will a mandamus lie to the benchers of an Inn to admit

(*a*) *Ex parte Cole* (1779), 1 Dougl. 114; *ex parte Warner* (1842), 6 Jur. 1016.

(*b*) *In re Bateman* (1845), 2 D. & L. 725; 6 Q. B. 853. As to barristers becoming solicitors, see 23 & 24 Vict. c. 127, ss. 3, 16; 40 & 41 Vict. c. 25, s. 12.

(*c*) *Hudson v. Slade* (1862), 3 F. & F. 390. See 46 & 47 Vict. c. 51, s. 38, subs. 7.

(*d*) See *Manisty v. Kenealy* (1876), 24 W. R. 918.

(*e*) 36 & 37 Vict. c. 66, s. 12.

(*f*) See *per* Lord Mansfield, *Rex v. Gray's Inn* (1780), 1 Dougl. at p. 354; *in re Justices of the Court of Common Pleas at Antigua*, *per* Lord Wynford, 1 Knapp, 267.

(*g*) *Rex v. Benchers of Gray's Inn* (1780), 1 Dougl. 353.

a person as student (a). Indeed, until recent times there was no remedy at all open to a person whom the benchers refused to admit as a student, for the judges had originally no jurisdiction to hear an appeal except by admitted members, but now, by consent of the Inns, the judges hear appeals against refusals to admit (b).

The Courts will not try actions brought by members of an Inn of Court against benchers in respect of anything done by the benchers in their official capacity, and will not determine questions of title to chambers in the Inns of Court (c).

In *Booreman's Case* (d) a barrister who had been expelled from his Inn, and whose chambers had been seized for non-payment of commons, sued in the King's Bench for a writ of restitution, but the writ was refused on two grounds: first, that "there is none" in an Inn of Court "to whom the writ can be directed," as "it is no corporate body but only a voluntary society," secondly (and this seems the true ground), "because the applicant had waived the ancient and usual way of redress, which was by appealing to the judges."

In *Cunningham v. Wegg* (e), a member of Gray's Inn brought a bill in Chancery against the treasurer, benchers, and steward of his Inn for an account of monies paid for the renewal of grants of chambers and for a decree that his term in several sets of chambers might be renewed. The defendants pleaded to the jurisdiction that "there are four law societies, one of which is called Gray's Inn, that it is a voluntary society governed by benchers, who make rules for the regulation of the society and the letting, etc., of chambers subject to an appeal, in case of dispute, to the Lord Chancellor and the twelve judges." Lord Thurlow, L.C., allowed the plea, and said, "There is no instance of a

(a) *Rex v. Benchers of Lincoln's Inn* (1825), 4 B. & C. 855.

(b) See *Hayward's Case*, 95.

(c) *Clement's Inn, case of* (1661), 1 Keb. 135.

(d) (1642) March, 177.

(e) (1787) 2 Bro. Ch. Ca. 240.

suit with relation to the discipline or property of chambers in an Inn of Court. The defendants say, as far as they have acted, they are liable to the jurisdiction of the judges. It is a claim among persons having privilege, therefore this is not the proper jurisdiction."

In *Neate v. Denman* (a) a barrister of Lincoln's Inn filed a bill in Chancery to restrain an action at law on a bond for arrears due to the society; the plaintiff was willing to pay the arrears but claimed to be entitled to retire from the society without giving any undertaking not to practise as a barrister, or being subject to any conditions against his so practising, and without being liable to the payment of any fine or composition on his retiring. The defendants, who were the obligees of the bond, demurred to the bill on the ground that the Court had no jurisdiction to entertain it; Hall, V.C., allowed the demurrer, and held that he had no jurisdiction to try the questions raised between the plaintiff and the society, the right to retire being a matter to be decided by the internal regulations of the society itself, and the plaintiff's remedy being by appeal to the judges as visitors.

When the benchers resort to the Courts, as they may do (b), for the sake of enforcing their own decisions or securing payment of arrears or protecting their property, the Courts will not inquire into the propriety of their decisions or the reasonableness of their charges, the remedy in complaints on such matters being to the domestic tribunal of the judges.

Thus, in *Rosslyn v. Jodrell* (c), which was an action of debt on a bond executed by the defendant on his call to the bar, Lord Ellenborough, C.J., refused to enter into the question of the reasonableness of the charges or the legality of the orders of the society under which the charges were made; "sitting here," he said, "I am not prepared to enter

(a) (1874) L. R. 18 Eq. 127.

(b) See *Clement's Inn Case* (1661), 1 Keb. 135.

(c) (1815) 4 Campb. 303.

into a calculation of pounds, shillings, and pence, and to determine whether too much money is raised by the benchers, or whether the money which is raised is misapplied; if there be any abuse, apply to the twelve judges; they are the proper visitors of the Inns of Court, and they will grant redress."

In *Manisty v. Kenealy* (a), the defendant, who had formerly been a bencher of Gray's Inn and a trustee of its property, had been disbenched and disbarred; the benchers brought the action against him to obtain possession of a set of chambers which had been allotted to him as bencher, and an order to compel him to execute a conveyance of the property of the society to new trustees; the defendant pleaded that he was entitled to the chambers for his life, that in disbenching and disbarring him the plaintiffs had been actuated by malice and had acted *ex parte* without sufficient reason, and without giving him an opportunity of being heard in his defence, and that he had never legally ceased to be a member of the society; the plaintiffs demurred to the defence on the ground that the society itself, by its benchers, was the proper tribunal for deciding on all matters relating to the admission and expulsion of members, subject to an appeal to the Lord Chancellor and the judges; Hall, V.C., allowed the demurrer, holding that he could not enter into the question of the propriety of the expulsion, the jurisdiction on that question resting with the benchers alone, subject to an appeal to the judges.

In one case, in a matter which related to chambers in an Inn of Court but which did not arise directly between the society and a member, the benchers left the persons seeking redress to apply to a Court of equity, and the Court exercised jurisdiction (b). In this case the personal representatives of a member of Gray's Inn brought a bill against the defendant, the assignee of a mortgage of chambers, to redeem the mortgage; the plaintiffs had petitioned the

(a) (1876) 24 W. R. 918.

(b) *Rakestraw v. Brewer* (1728), 2 P. Wms. 511.

benchers to be admitted to redeem, and the Bench had made an order that the matters in dispute were matters of account which the Bench were not capable of taking, but that the plaintiffs were at liberty to seek their remedy in a Court of Equity. On the defendants objecting to the bill that the plaintiffs, not being able to get redress from the benchers, should have applied to the judges, Jekyll, M.R., said: "I would not meddle with this title to chambers, which is no legal one, but the benchers themselves having recommended it to the plaintiffs to come hither, and left them at liberty to make the application, therefore the bill is proper." A redemption decree was made, and was affirmed on appeal. This is, it is believed, the only reported case in which the Courts entertained a suit relative to the title of the property of an Inn of Court.

In the case of *Hudson v. Slade* (a) a question arose as to the nature and power of the benchers of an Inn of Court when engaged in an inquiry into the conduct of a member. The benchers of an Inn of Court had held an inquiry into the conduct of a barrister, a member of the Inn, with regard to transactions in relation to a certain company. The barrister produced as a witness in his favour a director of the company. The benchers cross-examined the director as regards certain letters in a letter-book procured by them from the solicitor to the company; the book contained letters and copies of letters to and from the company with reference to the business of the company. The witness afterwards asked for the book to offer an explanation, and having got it, put it into his pocket, said he would keep it, and refused to return it. Thereupon the benchers directed the porter to retake it by force. This the porter did, and the director brought an action against four of the benchers, the under-treasurer, and the porter. Cockburn, C.J., who tried the case, directed the jury that, supposing the letter-book was not the plaintiff's private property, the benchers had lawful possession of it for the purposes of the inquiry. He

(a) (1862) 3 F. & F. 390.

went on to say that the benchers, when inquiring into alleged delinquencies on the part of a member of the bar, although they had no power of compelling persons to attend as witnesses or to produce documents, were yet more than a "friendly tribunal," that is, one which sits by the consent of both parties for the adjustment of mutual differences. "The benchers," the learned judge went on to say, "on a charge being preferred against a member of the bar, are armed with powers to disbar him, that is, to deprive him of his professional position and existence. . . . I own I can conceive of no jurisdiction more grave and serious in its character and consequences. And its gravity and importance are only equalled by its high and salutary effects in preserving the profession of the bar from being disgraced by members of it who are guilty of conduct unworthy of it and contrary to that which all its members agree to maintain."

Apart from the Inns of Court there was, until recent times, no organisation of the whole body of the English bar. In December, 1883, a meeting of the bar was held, and it was resolved that a body called the Bar Committee should be constituted to "collect and express the opinion of the members of the bar on matters affecting the profession and to take such action thereon as may be deemed expedient;" the Bar Committee, which was composed of persons elected by the whole bar, continued to act till 1894, and amongst other things, agreed with the Incorporated Law Society on certain rules for regulating the practice as to retainers (*a*). In 1894 its place was taken by the "General Council of the Bar," a consultative body, elected by, and the accredited representative of the bar, and having power conferred on it "to deal with all matters affecting the profession, and to take action thereon as may be deemed expedient;" at the meeting of the bar at which the council was constituted, it was agreed that the Council should have no power to interfere with the property, jurisdiction, powers, or privileges of the Inn of Court or any of them, and

(*a*) See *post*, p. 128.

that no part of the disciplinary jurisdiction of the Bench of the Inns of Court should be exercised by the Council, and that the Council should hold no inquiry into alleged misconduct of individual members of the bar, except for the purpose of reporting, if necessary, to the Inn of which the barrister is a member (*a*). The General Council of the Bar has continued up to the present time to act as the representative of the bar and to answer questions and lay down rules regulating the etiquette of the profession (*b*). The Chairman of the Council, in conjunction with the President of the Incorporated Law Society, undertakes the settlement of differences between barristers and solicitors on the parties signing a memorandum agreeing to submit the matters in dispute (*c*).

(*a*) Twelfth Annual Statement of the Bar Committee and the First of the General Council of the Bar.

(*b*) See Annual Practice, 1904, II. 660.

(*c*) Annual Statement of the General Council of the Bar, 1900-01, 15.

CHAPTER III.

THE RIGHT OF AUDIENCE.

BEFORE the passing of the Promissory Oaths Act, 1868 (*a*), barristers had to take the oath of allegiance to the Crown (*b*), in the Court of King's Bench, and the newly admitted barrister signed the roll in that Court as an authentication of the oath. Since the passing of the Promissory Oaths Act, 1868, no oath or declaration is required to be taken in court by persons on being called to the bar (*c*). Nor is it necessary to sign the roll, for the necessity to sign was abolished with the obligation to take the oath (*d*). The admission of a person to the rank of barrister is the Act of the Inn of Court to which he belongs, and in England is not completed by any act of the Court. As soon as a person has been called to the bar, he can, unless he is prohibited either by statute or by some convention of the bar or some condition or limitation imposed upon him by his Inn, practise as counsel in accordance with the rules of the profession. There are certain offices and employments, the holders of which are prevented by statute or by the rules of the profession from practising at the bar (*e*), but in the absence of any such disqualification, a person, as soon as he has been called, can begin to practise at the

(*a*) 31 & 32 Vict. c. 72.

(*b*) 5 Eliz. c. 1; s. 5 (repealed 9 & 10 Vict. c. 59); 1 W. & M. c. 8 (repealed 34 & 35 Vict. c. 48); 21 & 22 Vict. c. 48.

(*c*) Sec 9 B. & S. 966. One result of the abolition of the oath is that aliens can be and are admitted to the English bar.

(*d*) *In re Perara* (1887), 3 Times L. R. 677.

(*e*) See *post*, pp. 150-1, 154, 160.

bar (a). The sphere of a barrister's practice includes advising on questions of law, drafting pleadings, conveyances, and other documents, and acting as an advocate (b).

The most important part of the privilege of a barrister is the right to practise as an advocate in all the superior, and most of the inferior, courts in England. This right is in most cases to the exclusion of all other persons, but is in some cases exercised concurrently with solicitors and others. A litigant, if an individual, may in all courts conduct his own case in person, with this exception, that a pauper, to whom counsel has been assigned, can only appear in the Supreme Court by the counsel who has been assigned to him, unless there has been a renunciation or reassignment of counsel, or the litigant has been dispaupered (c). But the right to appear on behalf of a litigant, or the crown, or of a prisoner, is in most courts limited to members of the bar.

Another privilege of a barrister is the right of authenticating by his name the report of a case decided in court; "as soon as a report is published of any case with the name of a barrister annexed to it, the report is accredited, and may be cited as an authority before any tribunal" (d).

(a) There are certain rules of the profession which disqualify individual barristers from practising in particular courts, *e.g.* a barrister who is a county magistrate cannot practise at petty or quarter sessions in the county where he is a magistrate, Annual Statement of the General Council of the Bar, 1896-97, 10, and the son or near relation of a county court judge cannot practise before his father or near relation, Annual Statement of the General Council of the Bar, 1895-96, 6.

(b) It is slander of a barrister by way of his profession, and therefore actionable *per se* to say of him that he is "no lawyer," or in any other way to impute to him ignorance of law or unskillfulness or incompetence in the exercise of his profession, *Peard v. Jones* (1635), Cro. Car. 382, Roll. Abr. 55; *Palmer v. Boyer* (1594), Owen 17, Cro. Eliz. 342; *Bankes v. Allen* (1616), Roll. Abr. 54; Odgers on Libel and Slander, 3rd ed., 76, 82.

(c) *Parkinson v. Hanbury* (1853), 4 De G. M. & G. 508; *Hamer v. Boreham* (1858), 27 L. J. P. & M. 107; *aliter* of a pauper to whom no counsel has been assigned, *Tucker v. Collinson* (1886), 16 Q. B. D. 562.

(d) Lord Westbury, L.C., Hans. Parl. Deb., 3rd ser. clxxi. 778; History of the Law Reports, by W. T. S. Daniel, 34, 56. See *West Derby, etc., Guardians v. Atcham* (1889), 6 Times R. 6, per Lord Esher, M.R.

House of Lords.—In the House of Lords, when sitting as the ultimate tribunal of appeal for the United Kingdom, English, Irish, and Scotch counsel have equal and exclusive right of audience as advocates (*a*). Counsel are not generally heard before the House of Lords Appeal Committee (*b*).

In proceedings on impeachment before the House of Lords, the person impeached has the right to be defended by counsel who are assigned for that purpose after the articles of impeachment are exhibited by the Commons (*c*).

In proceedings upon public bills, counsel have been heard for petitioners against bills at the bar, both of the House of Lords and of the House of Commons, but only in cases when the particular interests of the petitioners have been involved (*d*).

In proceedings upon bills which affect the status of particular individuals, such as “bills of pains and penalties, disabilities and disfranchisement,” it is usual to allow the parties affected to be heard by counsel in both houses (*e*).

In proceedings upon private bills, counsel have been heard at the bar of both Houses (*f*). In proceedings before committees on private bills counsel are heard, but have no exclusive right of audience; parliamentary agents have also been heard (*g*).

Before select committees of either House appointed to inquire into matters concerning the character or conduct of individuals, counsel have been heard by order of the House obtained on the petition of the persons concerned (*h*).

(*a*) Macqueen, *Practice of the House of Lords*, 203. See *Attorney-General v. Lord Advocate* (1834), 2 Cl. & F. at p. 487.

(*b*) *Cleaver v. Cleaver* (1884), 9 App. Ca. at p. 633. But see *Viscount Holmesdale v. Mortimer Sackville West*, *Lords' Journals*, cix, at p. 359.

(*c*) Erskine May, *Parliamentary Practice*, 627; 20 Geo. II. c. 30; *Lords' Journals*, xlv. 439.

(*d*) Erskine May, *Parliamentary Practice*, 450; *Hansard*, cxi. 943.

(*e*) Erskine May, 450.

(*f*) Clifford, *History of Private Bill Legislation*, ii. 852.

(*g*) *Ib.*, ii. 871; Erskine May, 771.

(*h*) Erskine May, 391.

Counsel, who are members of the House of Commons, cannot appear as advocates before that House, or before any parliamentary committee (*a*), but may plead at the bar of the House of Lords in all matters, except such as are of a legislative character (*b*).

When counsel are heard before either House or any parliamentary committee, Scotch and Irish counsel seem to have equal right of audience with English counsel.

In the Judicial Committee of the Privy Council, English, Scotch, Irish, and colonial counsel have the right of exclusive audience as advocates (*c*).

In the Supreme Court of Judicature constituted by the Judicature Act, 1873 (*d*), and composed of two branches, the Court of Appeal and the High Court of Justice, English barristers have exclusive right of audience as advocates in the Court of Appeal (*e*), and in all sittings in open court of the High Court except in bankruptcy. At the time of the passing of the Judicature Act, 1873, barristers had this right in all the courts which were united by that act into one court under the name of the Supreme Court of Judicature (*f*); the right was shared by the members of two orders now almost extinct, namely the sergeants-at-law, an order of which only barristers could become members, and the advocates of the civil law (*g*). This right, as being part of the then existing procedure, was preserved by the Judicature Acts, 1873 and 1875 (*h*), and the rules made under them (*i*). In the London Court of Bankruptcy, solicitors

(*a*) Erskine May, 82.

(*b*) Macqueen, Practice of the House of Lords, 203.

(*c*) Cordery on Solicitors, 3rd ed., 216; 19 L. J. (newsp.) 596; Annual Statement of the General Council of the Bar, 1900-01, p. 12.

(*d*) 36 & 37 Vict. c. 66.

(*e*) See *ex parte Russell, in re Elderton* (1887), 31 Sol. Jo. 235.

(*f*) *Collier v. Hicks* (1831), 2 B. & Ad. at p. 668; 9 & 10 Vict. c. 54 (Common Pleas); 20 & 21 Vict. c. 77, s. 40 (Probate Court); 20 & 21 Vict. c. 85, s. 15 (Divorce Court); 22 & 23 Vict. c. 6, s. 1 (Admiralty Court).

(*g*) See 20 & 21 Vict. c. 77, s. 41.

(*h*) 36 & 37 Vict. c. 66, s. 23; 38 & 39 Vict. c. 77, s. 21.

(*i*) Rules of Court, 1875, First Schedule, headnote; R. S. C. 1883, O. lxxii.

had a right to appear as advocates as well as barristers (*a*); when this Court became a part of the Supreme Court of Judicature (*b*), the solicitor's right of audience concurrent with that of barristers was preserved in sittings of the High Court in bankruptcy (*c*); this right extends to the hearing in a Divisional Court of an appeal from a County Court sitting in Bankruptcy (*d*). But the right is confined to a solicitor who is instructed by a client and does not extend to the clerk of such a solicitor or to a solicitor appearing as an advocate for a solicitor who is instructed by the client (*e*), and is limited to the High Court and does not apply to the Court of Appeal (*f*).

Except in bankruptcy proceedings in the High Court neither solicitors nor any other persons but members of the English bar can be heard as advocates in any sitting in open court of any branch of the Supreme Court of Judicature (*g*). A solicitor cannot even consent to a verdict, but must instruct counsel (*h*). In sittings of the High Court in chambers counsel have the right to appear, but not the right of exclusive audience (*i*).

Although litigants in person are allowed to conduct actions for themselves and to make some applications, there are certain applications which are of such a nature that they

(*a*) 32 & 33 Vict. c. 71, s. 70.

(*b*) 46 & 47 Vict. c. 52, s. 93.

(*c*) *Ib.*, s. 151.

(*d*) *Ex parte Reynolds, in re Barnett* (1885), 15 Q. B. D. 169.

(*e*) *Ex parte Broadhouse, in re Broadhouse*, L. R. 2 Ch. 655; *in re Bull* (1852), 20 L. T. O. S. 24; *ex parte Streeter, in re Morris*, 19 Ch. D. 216.

(*f*) *Ex parte Russell, in re Elderton* (1887), 31 Sol. Jo. 235.

(*g*) See *Cobbett v. Hudson* (1850), 15 Q. B. 988; *Drake v. Morgan* (1858), 27 L. J. P. & M. 2; *Attorney-General v. Marmion, Armstr. Mac. and O.* (1841) 98. But see *Doxford v. Sea Shipping Co.* (1897), 14 Times R. 111. As to *amicus curiæ*, see Bouvier's Law Dictionary, edited by Rawle, *sub nom.*

(*h*) *London Engineering and Iron Shipbuilding Co. v. Cowan* (1867), 16 L. T. N.S. 573.

(*i*) R. S. C. 1883, O. lv. r. 1a; O. lxx. r. 27 (16). See *in re Chapman* (1882), 10 Q. B. D. 54; *in re Gregory* (1890), 90 L. T. newsp. 56; *Dickson v. Harrison*, 9 Ch. D. at p. 246; *in re Bethlehem, etc., Hospitals* (1885), 30 Ch. D. at p. 542.

can only be made by counsel. To this class belong applications for the prerogative writ of *mandamus* (*a*), for a rule in the nature of a *mandamus* under S. 5 of Jervis's Act (*b*), if applied for in open court, for a writ of *certiorari* to remove an order of justices, if applied for in open court (*c*), for an information on behalf of the Attorney-General (*d*), for a writ of *habeas corpus* (*e*), if applied for in court, for a criminal information (*f*), and for an attachment if applied for in court (*g*).

Applications in court to strike a solicitor off the rolls can only be made by counsel (*h*). Most of such applications along with applications for a rule calling upon a solicitor to answer matters in an affidavit are now by the Solicitor's Act, 1888 (*i*), made to the Incorporated Law Society and are heard by a statutory committee before whom either party may appear in person or by counsel or solicitor (*j*); the committee, if they think that a *prima facie* case of misconduct is established, must report to the High Court. When the report is brought before the

(*a*) *Ex parte Wason* (1869), 10 B. & S. 580; *Reg. v. Mansel Jones*, Short and Mellor's Practice of the Crown Office, 38n.; *Reg. v. Stanbury Eardley* (1885), 49 J. P. 551; *Reg. v. Mayor of Liverpool* (1891), 7 Times L. R. 592; Tapping on Mandamus, 296.

(*b*) 11 & 12 Vict. c. 44. *Ex parte Wallace* (1902), 2 K. B. 488, overruling *Reg. v. Biron* (1884), 54 L. J. M. C. 77, and *ex parte Lewis* (1888), 21 Q. B. D. 191.

(*c*) Short and Mellor, Practice of the Crown Office, 128. In *ex parte Bradlaugh* (1878), 3 Q. B. D. 509, the application was made by a person who was not a barrister, but the point as to his right to apply does not seem to have been raised.

(*d*) *Attorney-General v. Barker* (1838), 4 Myl. & Cr. 262.

(*e*) Short and Mellor, Practice of the Crown Office, 350; *in re Newton* (1855), 16 C. B. at p. 99; but a wife has been allowed to apply in person on behalf of her husband, *ex parte Cobbett*, 15 Q. B. 181n.

(*f*) *Rex v. JJ. of Lancashire* (1819), 1 Chitt. 602; *Doe d. Bennett v. Hale* (1850), 15 Q. B. at p. 179; Shortt on Informations, etc., 52.

(*g*) *Ex parte Fenn* (1834), 2 Dowl. 527.

(*h*) *Anon.* (1834), 3 N. & M. 566; *Anon.* (1881), 16 L. J. (newsp.) 153; *ex parte Pitt* (1833), 2 Dowl. 439.

(*i*) 51 & 52 Vict. c. 65, s. 13.

(*j*) Rules under the Solicitors Act, 1888, Part I. s. 5, Annual Practice 1905, II. 626.

Court no one but counsel can be heard in support of the charges made against the solicitor (*a*). In certain cases (*b*), applications to strike a solicitor off the rolls may still be made direct to the Court without any reference to the Incorporated Law Society and such applications can only be made by counsel (*c*).

In criminal proceedings in the High Court or at the Assizes or at the Central Criminal Court prosecutors in person are not allowed to appear, but prosecutions must be conducted by barristers who, when acting in this capacity are said to be of the nature of public officers (*d*). Counsel could not by the common law appear in criminal trials for defendants accused of felony and treason, except to argue points of law (*e*): this rule was altered by statute, and defendants were allowed counsel in cases of treason by 7 and 8 W. III., c. 3, s. 1, and of felony 6 and 7 W. IV., c. 114.

The right of English counsel to appear in Scotland, at a trial for treason, held under a special commission, under the seal of the United Kingdom in conformity with English procedure was disputed in one case (*f*), but the objection was overruled.

Inferior Courts.—In some inferior courts barristers have exclusive right of audience as advocates, in others they have a right of audience as advocates concurrently with solicitors and other persons, in others they are expressly excluded by statute from appearing. If in any court there is no statutory enactment or established practice defining what persons are heard as advocates, the court itself has the

(*a*) *In re a Solicitor* (1903), 2 K. B. 205.

(*b*) *In re Weare* (1893), 2 Q. B. 439.

(*c*) See cases cited p. 17, note (*h*).

(*d*) *Rex v. JJ. of Lancashire* (1819), 1 Chitt. 602; *Rex v. Brice* (1819), *ib.* 352; *Rex v. Milne*, 2 B. & Ald. 606n.; *Rex v. Stoddart* (1819), Dickinson's Quarter Sessions, 6th ed., 152; *Reg. v. Gurney* (1869), 11 Cox C. C. 422; *Reg. v. Page* (1845), 2 Cox C. C. 221; *Reg. v. Littleton* (1840), 9 C. & P. 671.

(*e*) Hawkins, Pleas of the Crown, bk. ii. cap. 39, 8th ed., ii. 554.

(*f*) *Rex v. Hardie* (1810), 1 St. Tr. N.S. 609. Scotch counsel have been heard at trials before special commissions in England for treasons committed in Scotland, *ib.*, 1 St. Tr. N.S. 661n.

power to regulate its own procedure and to determine what persons shall have audience (a).

Mayor's Court.—In the Mayor's Court in the City of London, barristers have exclusive right of audience at all sittings in open court (b).

Quarter Sessions.—In most Courts of Quarter Sessions in counties, the rule is to give exclusive audience to barristers, when a sufficient number attend (c). That Courts of Quarter Sessions have power to make such a rule was decided by the Queen's Bench in *ex parte Evans* (d), on an application to quash an order of the justices of Denbighshire in Quarter Sessions giving exclusive audience to barristers at all times when four barristers were present; no barristers before the order had attended the Court except on special retainer, and the business of the Court had usually been done by attorneys; the Court of Queen's Bench refused the application to quash the order. As regards Courts of Quarter Sessions in boroughs, Lord Denman, C.J., when consulted by the Recorder of Oxford, gave an extra-judicial opinion that barristers might be accorded pre-audience, but not exclusive audience (e). But it is submitted that the effect of the decision in *ex parte Evans* (f), cannot be confined to counties and that Courts of Quarter Sessions in boroughs may grant exclusive audience to barristers where a sufficient number attend; in many Courts of Quarter Sessions in boroughs it is usual to give barristers exclusive audience.

When the rules of a Court of Quarter Sessions provided that "consents should be signified by counsel in open

(a) *Ex parte Evans* (1846), 9 Q. B. 279.

(b) Glyn, Jackson and Probyn's *Mayor's Court Practice*, 3; L. J. newsp. 1883, 490; Brandon, *Notes of Practice of the Mayor's Court*, 3, 76.

(c) *Collier v. Hicks* (1831), 2 B. & Ad. at p. 669; Dickinson's *Quarter Sessions*, 6th ed., 152.

(d) (1846) 9 Q. B. 279.

(e) Manning, *Serviens ad Legem*, 125n.; Dickinson's *Quarter Sessions*, 6th ed., 153; Pritchard's *Quarter Sessions*, 1st ed., 99, 2nd ed., 103.

(f) 9 Q. B. 279.

Court" it was held that the Court was right in refusing to allow the clerk of an Assessment Committee on an appeal against a valuation list to consent to the alteration of the list (*a*).

At all Sessions where there is a sessions bar an appeal cannot be respite except upon motion by counsel (*b*).

County Courts.—As regards county courts it is expressly provided by the County Courts Act, 1888 (*c*), that a barrister "retained by or on behalf of any party on either side," may address the Court, but that barristers have no right of exclusive audience; a solicitor "acting generally in the action or matter" for a party (*d*), and by leave of the judge "any other person" may also address the Court.

Before the sheriff's court counsel have the right to appear, but have no exclusive right (*e*).

Before a coroner's court counsel are entitled to be present on behalf of persons interested (*f*).

Petty Sessions.—When justices of the peace are sitting as a court of summary jurisdiction, both complainant and defendant are entitled by statute (*g*) to be represented by counsel; a complaint or information may be made or laid "by the complainant or informant in person, or by his counsel or attorney or other persons authorised in that behalf;" the "room or place in which the justices sit to hear the complaint or information is to be deemed an open and public court to which the public generally may have access, so far as the same can conveniently contain them; the party against whom such complaint is made or

(*a*) *Reg. v. JJ. of London*, 100 C. L. T. (newsp.), April 11th, 1896, 560.

(*b*) Annual Statement of General Council of the Bar, 1903-04, 15.

(*c*) 51 & 52 Vict. c. 43, s. 72.

(*d*) See *Reg. v. Judge of County Court of Oxfordshire* (1894), 2 Q. B. 440.

(*e*) If a litigant intends to be represented by counsel in an inquiry to assess damages, he should give notice of his intention to the other side. Chitty's Archbold's Practice, 1335.

(*f*) *Barclay's Case*, 2 Sid. 101; Jervis on Coroners, 6th ed. 25; see *Garnett v. Ferrand* (1827), 6 B. & C. 611.

(*g*) 11 & 12 Vict. c. 43 s. 10.

information laid shall be admitted to make his full answer and defence thereto, and to have the witnesses examined and cross-examined by counsel or attorney on his behalf; and every complainant or informant in any such case shall be at liberty to conduct such complaint or information respectively and to have the witnesses examined and cross-examined by counsel or attorney on his behalf" (a). Before the passing of this statute it was held that no persons had the right to act as advocates on the trial of an information before justices of the peace without their permission (b). But it was also held that, where justices sat as a court of summary jurisdiction, they were exercising a judicial function and that their proceedings ought to be public and not private, and therefore that justices were not warranted in turning out of the room where they sat a person who did not interrupt the proceedings (c).

An appearance by counsel or solicitor before a court of summary jurisdiction, is a sufficient appearance. In *Bessell v. Wilson* (d), the plaintiff had been convicted before a court of summary jurisdiction and adjudged to pay a penalty under the Copyright of Designs Act (e); not having paid the penalty, he was summoned before the same Court to show cause why he should not be committed to prison for default; on this summons he did not appear in person, but counsel and attorney appeared for him. The magistrate refused to hear the case in his absence, and issued a warrant under which he was imprisoned; the conviction was afterwards quashed, and the plaintiff sued the magistrate for false imprisonment; it was contended on behalf of the magistrate that the plaintiff did not appear "according

(a) 11 & 12 Vict. c. 43, s. 12. See *Duncan v. Toms* (1887), 56 L. J. M. C. 81; *Webb v. Catchlove* (1886), 50 J. P. 795; *ex parte Local Board of Leamington* (1862), 5 L. T. N.S. 637.

(b) *Collier v. Hicks* (1831), 2 B. & Ad. 668; *Reg. v. JJ. of Staffordshire* (1819), 1 Chitt. 217.

(c) *Daubney v. Cooper* (1829), 10 B. & C. 237.

(d) (1853) 1 E. & B. 489; 22 L. J. M. C. 94; 17 J. P. 567; 17 Jur. 664.

(e) 6 & 7 Vict. c. 65.

to the exigency of the summons" within s. 2 of 11 & 12 Vict. c. 44, and that the magistrate was entitled under that section to have the verdict entered for him, but the Court of Queen's Bench decided against this contention, and held that appearance by counsel or solicitor was "appearance according to the exigency of the summons."

Justices may, if they think fit, on proof of the service of the summons, hear and determine in the absence of the defendant (*a*), a case which is within their jurisdiction. In one case (*b*), it was argued that justices had no power to convict on a plea of guilty in the absence of the defendant, but the Court gave no judgment on this point (*c*). A defendant who has been summoned before a court of summary jurisdiction has no right to have the proceedings adjourned for the sake of obtaining legal assistance, and the refusal to adjourn is within the jurisdiction of the magistrate, and is no ground for quashing a conviction (*d*).

In bastardy proceedings the applicant for an affiliation order may "be assisted in her application by counsel or attorney" and the person summoned as the putative father "may appear and make his answer by counsel or attorney," and either of such parties may "have all witnesses examined and cross-examined by such counsel or attorney" (*e*).

When justices are sitting not to dispose of cases with which they can finally deal but to inquire whether an accused person shall, or shall not, be committed for trial; the room or building in which they are sitting is not according to the provisions of the Indictable Offences Act, 1848 (*f*), to be deemed an "open court." It was decided

(*a*) 11 & 12 Vict. c. 43, s. 13.

(*b*) *Reg. v. Aves* (1871), 24 L. T. 64.

(*c*) See *Rex v. Simpson* (1763), 1 Stra. 44.

(*d*) *Reg. v. Biggins* (1862), 5 L. T. 605.

(*e*) 8 Vict. c. 10, s. 7.

(*f*) 11 & 12 Vict. c. 42, s. 19; but see 42 & 43 Vict. c. 49, ss. 17 and 50; 52 & 53 Vict. c. 63, s. 13; Stone's Justices' Manual, 36th ed. 16; 60 J. P. 12 (*per Hawkins, J.*).

that on such an inquiry before that Act was passed, an accused person had no right to be represented by counsel or solicitor (*a*); but while the Indictable Offences Act contains no provision expressly authorising the appearance of counsel or solicitor, yet s. 17 of that Act contemplates the cross-examination of a witness by the counsel or solicitor of the accused person, and Pollock B. gave an express though extra-judicial opinion (*b*), that prisoners have a right to be represented by counsel or solicitor at the preliminary inquiry before justices. It is the usual practice to allow counsel or solicitor to appear at such an inquiry on behalf of the prosecutor, if it is so desired.

The provisions of the Indictable Offences Act, 1848 (*c*), seem to imply that personal appearance by the defendant is necessary, and that the attendance by counsel or solicitor is not sufficient.

So with regard to subsequent proceedings on an indictment, the prisoner must be present and plead personally, otherwise there is no issue to try, but in informations and indictments for not repairing roads, bridges, etc., the defendant is allowed *ex gratiâ* to appear by solicitor, and the general issue is engrossed (*d*). No trial for felony can be had except in the presence of the prisoner. A trial for misdemeanour can be so held if the accused has previously pleaded (*e*), and has even proceeded in the absence of the defendant (*f*). When an indictment is removed by *certiorari* into the King's Bench Division, the defendant may plead by a solicitor (*g*), except in cases of felony, when the defendant "must appear in person in open court, unless the

(*a*) See *Cox v. Coleridge* (1822), 2 D. & R. 86; 1 B. & C. 37; *Rea v. Borron* (1820), 3 B. & Ald. 432.

(*b*) *Reg. v. Griffiths* (1886), 54 L. T. 280; 16 Cox C. C. 46. See Stephen, Digest of Criminal Procedure, art. 110n.; Stone's Justices' Manual, 36th ed., 15.

(*c*) 11 & 12 Vict. c. 42, ss. 17, 18, and 25.

(*d*) Archbold's Criminal Pleading, 22nd ed., 164, 1157.

(*e*) Archbold, 169.

(*f*) *Reg. v. Orton* (1873), *ib.*, 170.

(*g*) C. O. R. Form No. 78; Short and Mellor, Crown Practice, 621.

Court or a judge shall order that the defendant be at liberty to appear and plead by solicitor" (a).

Courts-Martial.—As regards the procedure before army courts-martial counsel (*i.e.* in this case a barrister or a solicitor) may appear on behalf of both the prosecutor and the prisoner at general and district courts-martial (1) when held in the United Kingdom, (2) when held elsewhere, if the commander-in-chief or the convening officer declares that it is expedient to allow such appearance. A prisoner must give notice of his intention to have counsel to assist him, either on the day on which he is informed of the charge against him or at any time not being less than seven days before the trial or such shorter time as in the opinion of the Court would have enabled the prosecutor to obtain counsel to assist him. If the convening officer so directs, counsel may appear on behalf of the prosecutor, but, except where the prisoner has himself given notice of his intention to have counsel, notice of the direction for counsel to appear must be given to the prisoner at such time, not in any case less than seven days before the trial as would in the opinion of the Court have enabled the prisoner to obtain counsel. Counsel who appear at an army court-martial have the same right as the prosecutor or the prisoner for whom he appears, that is, may address the Court and examine and cross-examine witnesses (b). In the case of courts-martial to which the preceding rules do not apply, a prisoner may have a legal adviser to assist him, and the person so assisting him may advise him on all points and suggest questions, but, it seems, may not examine or cross-examine witnesses himself, and may not address the Court (c).

As regards navy courts-martial, a prisoner may have an officer, a legal adviser, or any other person to assist him during the trial; the person so assisting the prisoner may

(a) C. O. R. 83; *Rex v. Penprase* (1833), 4 B. & Ad. 573.

(b) "Manual of Military Law," published by the War Office, 1899, "Rules of Procedure," 88-93, *ib.*, p. 646.

(c) *ib.*, r. 87.

suggest questions to be put to witnesses and may read the prisoner's defence or statement, but cannot address the Court (a).

Before commissioners appointed under the Church Discipline Act, 1840 (b), to examine witnesses upon oath and inquire whether there is a sufficient *prima facie* ground for further proceedings, counsel on both sides can not only examine and cross-examine witnesses, but also address the Court (c).

In any proceeding under the Public Worship Regulation Act, 1874 (d), either party may appear by counsel or solicitor.

Barristers can practise before the Ecclesiastical Courts, but, except where the rules of the Court so prescribe, have no exclusive right of audience (e). The rules of the Consistory Courts of London, Chichester, Hereford, Lichfield, Ripon, and Wakefield, and of the Commissary Court of Canterbury require that "in opposed faculty cases, or cases in which the Judge has directed the faculty to be moved for in Court, the faculty shall be moved for in Court by counsel or by a petitioner in person" (f).

Before the Vice-Chancellor's Court at Oxford, each party may be heard by counsel (g).

In appeals to General Commissioners from assessments under the Income Tax Acts, the General Commissioners may permit any barrister or solicitor to plead before them, either *vivâ voce* or in writing (h).

Barristers and solicitors are heard on appeals against

(a) "Admiralty Instructions," 1899, 633; Stephens, Clifford and Smith, Manual of Naval Law, 79.

(b) 3 & 4 Vict. c. 86; see 55 & 56 Vict. c. 32, s. 14 (3).

(c) *In re Monckton* (1849), 3 Notes of Cases Eccl. Supp., lxii.

(d) 37 & 38 Vict. c. 85, s. 11.

(e) Phillimore, Eccl. Law, ii. 936.

(f) Chancellor Tristram's Consistory Judgments, suppl., 293; Phillimore, Eccl. Law, ii. 998.

(g) Annual Register, 1863, Chronicle, 35.

(h) 61 & 62 Vict. c. 10, s. 16, repealing 43 & 44 Vict. c. 19, s. 57, subs. 9.

assessments to Land Tax, and in proceedings for penalties before District Commissioners of Income Tax (a).

In the Courts of a Revising Barrister, it is expressly enacted that "no party or other person shall appear or be attended by counsel" (b). This prohibition extends to counsel who wishes to act without fee on behalf of a political association of which he is president (c).

At an inquiry or arbitration held under the ninth section of the Local Government Act, 1894 (d), the person or persons holding the inquiry or arbitration "shall not hear counsel except in such cases as may be prescribed."

Apart from ancient usage or statute to the contrary, every tribunal has a discretion to determine who shall be permitted to appear as advocates before it. Thus an arbitrator under the Friendly Societies' Act (e) has a discretion to determine whether he will hear counsel or not (f), and it has been said that arbitrators in general have a like discretion, but "in many cases they would be wrong if they refused the party the privilege of appearing by counsel" (g). And where one party to a reference attended by counsel without having given notice of his intention to do so, and the other party attended without counsel and applied for an adjournment in order to instruct counsel, and the arbitrator refused to adjourn and made his award, the award was referred back to the arbitrator on the ground that it was unreasonable that one party should have the assistance of counsel and that the other should not, if he wished (h).

The chief gas examiner of the Metropolitan District has a discretion to determine whether he shall or shall not

(a) "Bourdin's Land Tax," 4th ed., 42.

(b) 6 Vict. c. 18, s. 41.

(c) *O'Connor v. Nicholson* (1891), 1 Fox & Smith Reg. Cases, 250.

(d) 56 & 57 Vict. c. 73, s. 9, subs. (11).

(e) 59 & 60 Vict. c. 25, s. 68.

(f) See *In re Macqueen* (1861), 9 C. B. N.S. 793.

(g) *Ib.*; "Russell on Arbitration," 8th ed., 120.

(h) *Whatley v. Morland* (1833), 2 Dowl. 249.

hear counsel upon an appeal from the report of a gas examiner (a).

On the hearing of an application for the making of an order under s. 2 of the Charitable Trusts Act, 1860 (b), the Charity Commissioners have a discretion to determine whether they shall or shall not hear counsel; they only hear counsel in exceptional cases (c).

If a person has received a notice which the Corrupt and Illegal Practices Prevention Act, 1883 (d), requires to be given before he can be reported as guilty of a corrupt and illegal practice, so that he may have an opportunity of being heard "by himself" and of calling evidence in his defence to show why he should not be reported, he has no right on his appearing in consequence of the notice to be represented by counsel or solicitor (e). But, if the Court thinks fit, counsel or solicitor may be heard in such a case (f).

The power of determining what person shall or shall not appear as advocates before them is limited to judicial tribunals. Assessment Committees appointed under the Union Assessment Committee Act, 1862 (g), to hear objections against a valuation list, are not judicial tribunals, and have no power to make rules determining what persons may appear on behalf of objectors (h). In such a case, there being a right given by statute for the objector to appear, and the statute being silent as to whether he should appear

(a) *Reg. v. Williamson* (1890), 59 L. J. Q. B. 493.

(b) 23 & 24 Vict. c. 136.

(c) *Benthall v. Earl of Kilmorey* (1844), Tudor's Charitable Trusts, 3rd ed., 564. See *per* Lord Romilly, M.R., in *re Hackney Charities* (1864), 34 L. J. Ch. 175.

(d) 46 & 47 Vict. c. 51, s. 38.

(e) *Reg. v. Mansel Jones* (1889), 23 Q. B. D. 29.

(f) Day's Election Cases in 1892 and 1893, 78. See the *Bewdley Case* (1869), *per* Blackburn, J., 1 O'M. & H. 176, and the *Ipswich Case*, cited but not followed, *Reg. v. Mansel Jones*, 23 Q. B. D. pp. 30, 33.

(g) 25 & 26 Vict. c. 103, s. 18.

(h) *Reg. v. Assessment Committee of St. Mary Abbots, Kensington* (1891), 1 Q. B. 378.

personally or not, there is nothing to limit the right of the objector to appoint as his agent for appearance any person who is not manifestly improper. The meetings of licensing justices are perhaps in the same category as Assessment Committees (*a*).

There are some proceedings, such as inquiries by Royal Commissions, &c., where there may be no right for any one to appear except persons summoned, and in which therefore counsel can have no right to take part. In the Royal Commission to inquire into the Belfast Riots in 1886, the president refused to recognise the right of counsel to examine and cross-examine witnesses (*b*).

The Grand Jury in Criminal Courts only examine witnesses for the prosecution, the prisoner himself does not appear, and neither counsel nor solicitor is present (*c*), on behalf of either prosecution or defence (*d*).

Where the client himself has no right to be present, counsel has of course no larger right and cannot appear. Thus, where a tradesman was summoned before the Vice-Chancellor and heads of Colleges of the University of Cambridge for violating a regulation which required every tradesman with whom any person *in statu pupillari* should contract a debt exceeding £5, to send a notice of the same at the end of every quarter to the college tutor of the person indebted, on pain of being discommoded, and the tradesman appeared with his solicitor, but the solicitor was refused permission to attend, and the decree was made discommoding the tradesman in the absence both of the tradesman and his solicitor; it was held by the Court of Queen's Bench that the tradesman was not entitled to be heard by solicitor or counsel, that the proceeding was one to enforce discipline and was not a judicial proceeding, that the notice to the tradesman to attend was unnecessary, and that

(a) See *Boulter v. JJ. of Kent* (1897), A. C. 556.

(b) *Law Journal* (newsp.), 1886, 556.

(c) 1 Chitt., *Criminal Law*, 317.

(d) The practice formerly seems to have been different, *Trials of the Regicides* (1660), 5 St. Tr. 972n.

therefore he had no right to be represented by any one else (a).

A person may by his conduct deprive himself of the right which he would otherwise have of appearing or being represented at a judicial inquiry when he is an interested party. Thus, it has been held that a bankrupt who is in contempt, and keeps out of England in order to defeat his creditors, has no right to be represented at an inquiry into damages before the Official Receiver in his bankruptcy (b). But where an appellant alleges that an order made against him was without jurisdiction, the Court will not refuse to hear his appeal because he is in contempt (c).

In *Reg. v. Yscuado* (d), Erle, J., refused to assign counsel to a prisoner who stood "mute of malice."

(a) *Ex parte Death* (1852), 18 Q. B. 647; 21 L. J. Q. B. 337.

(b) *In re Langworthy*, *Times*, August 8th, 1887, 3.

(c) *Gordon v. Gordon* (1904), P. 163.

(d) (1854) 6 Cox C. C. 386.

CHAPTER IV.

COURT AND COUNSEL.

BARRISTERS are not, as solicitors are, officers of the Supreme Court (*a*), and the Court has no special control over them, and although it has been said that the Superior Courts have, by virtue of their inherent jurisdiction, power to suspend from practising before them particular barristers who have been guilty of misconduct, which renders them unfit to practise (*b*), there is, it is believed, no reported instance in recent times of the exercise of such a power in England (*c*). The statute 3 Edw. I. c. 29, which was made in affirmance of the common law (*d*), enacts that "if any sergeant, pleader, or other, do any manner of deceit or collusion in the King's Court, or consent unto it in deceit of the Court, to beguile the Court or the party, and thereof be attainted, he shall be imprisoned for a year and a day, and from thenceforth shall not be heard to plead in the Court for any man." The words "or other" are explained by Lord Coke in his exposition of the statute as including

(a) See *Wettenhall v. Wakefield* (1833), 2 Dowl. 759.

(b) *In re Justices of the Court of Common Pleas at Antigua* (1830), 1 Knapp. 267; Manning, *Serviens ad Legem*, 42.

(c) The judgment of the Court of Star-Chamber in *Prynne's Case* (1632-33, 3 St. Tr. 562, at pp. 576 and 580) ordering Lincoln's Inn to put Prynne out of the society is an instance of an illegal stretch of authority. The House of Commons, by a resolution of April 20th, 1641, declared the sentence to be illegal (Commons Journals, ii. 24, 123, 366). Prynne, who had been expelled from Lincoln's Inn by an order dated April 24th, 1634, was restored by an order dated May 20th, 1641, see Black Books of Lincoln's Inn, ii. 317, 358.

(d) 2nd Inst., 213.

apprentices (*a*), a term which is no longer in use, but was the name given, in the thirteenth century and later, to those persons who were not sergeants, but who practised as advocates in the King's Courts; the apprentices seem to have founded the Inns of Court in connection with which the term "barrister" came into existence; the term "apprentice" is no longer in use in this sense, and its place has been taken by the term "barrister"; therefore, the statute 3 Edw. I. c. 29 applies to barristers (*b*). Sir W. Blackstone in his Commentaries (*c*) speaks of the punishment awarded by this statute as "still sometimes inflicted for gross misdemeanours in practice," and refers to *Redding's case* (*d*). Redding, a barrister engaged as counsel for the Roman Catholic lords, who, on the evidence of the notorious Bedloe, were charged with complicity in the alleged Popish Plot, was accused of tampering with Bedloe and attempting to induce him to withdraw his evidence, and was tried in 1679 before Commissioners of oyer and terminer, and being found guilty, was sentenced to pay a fine of £1000, to stand in the pillory, and to be imprisoned for a year (*e*). Being afterwards set at liberty he came into the King's Bench before Scroggs, C.J., Dolben, Jones, and Raymond, JJ., and demanded that an information which he there brought in his hand might be received against the Commissioners who condemned him, of which Jones and Dolben, JJ., were two, and that the information might be filed. "But the Court did declare that he was in a wrong way to exhibit any information in this manner, and did cause his words whereby he did accuse the two judges of oppression to be recorded; and for those words (*f*), and

(*a*) 2nd Inst., 214.

(*b*) See *Mitchell's Case* (1741), 2 Atk. 173.

(*c*) 1st ed. (1768), iii. 29.

(*d*) (1680) Sir T. Raym. Rep., 376; Bac. Abridgm, Courts E., 7th ed., ii. 399.

(*e*) Howell's St. Tr., vii. 259, 310.

(*f*) The words in Bac. Abr. are: "Sir Thomas Jones and Sir William Dolben, contrary to Magna Charta, the king's oath and their oath, have ruined me."

for that he was infamous by having been on the pillory, the Gentlemen at the Bar did pray that his gown might be pulled over his ears, which was ordered and executed in Court (a), and he was also condemned in Court to pay the King £500 and to lie in prison till he paid it" (b). In this case neither the punishment inflicted by the Commissioners of oyer and terminer, nor that inflicted by the Court of King's Bench, seems to have purported to be under the statute of Edw. I.; no reference was made to the statute in the indictment in the first case (c), or in the sentence in either case, and the punishment on each occasion seems to have been for contempt of Court.

Lord Hardwicke, L.C., in dealing with a case of contempt of Court (d), refers to the statute of Edw. I. and to Coke's exposition of it, but seems to have had doubts as to his power to silence a barrister, and as to the procedure to be adopted. In this case, Mitchell, a barrister who had formerly been a solicitor, had been committed to prison for contempt in bringing about a marriage of a ward of the Court; he petitioned for his release and submitted "to be restrained from acting as a counsel." Lord Hardwicke said: "As to Mr. Mitchell's submission to be restrained from acting as a barrister, I shall at present give no other directions, but that according to his own submission he shall be restrained from acting as such till further orders, because from any inquiries that I have hitherto made, I am not satisfied what is the proper course to remove him from practising as a barrister. If Mr. Mitchell had continued a solicitor, there had been no difficulty, for the ready and proper way would have been to have struck him out of the roll of solicitors; and surely it would be very hard when he has advanced himself to a degree of greater rank and honour

(a) "By the tipstaff," *Bac. Abr. Courts E.*, 7th ed., ii. 399.

(b) The Court afterwards remitted the fine and imprisonment, *Sir Thomas Raymond Rep.*, 377.

(c) In fact Redding argued that the indictment was really an indictment for treason, *St. Tr.*, vii. 264.

(d) *Mitchell's Case* (1741), 2 *Atk.* 173.

in the law, that there should not be some precedents for degrading a person, who, by his malpractices, has rendered himself highly unworthy of the character he has taken upon him of a barrister-at-law. But whether this ought to be done by disbarring him, or whether the Court by its own power and authority will silence him for the future, I shall not at present determine."

The practice now seems to be that if a judge, in the course of a trial or otherwise, becomes acquainted with acts done by a barrister which are of such a serious character as to render him unfit to practise, the judge reports to the Inn to which the barrister belongs, and the Inn holds an inquiry, and if the case is established, punishes by disbarring.

A barrister may be punished by the Court for contempt in respect of acts done by him either in a private (*a*) or in a professional (*b*) capacity.

The proper punishment for contempt of Court is fine and imprisonment (*c*), and, if a Court has power to punish an advocate for contempt by suspending him from practice, it can only so punish him when the contempt is of such a nature as to "subject the individual committing it to an imputation of bad character, so as to render his remaining in the Court as a practitioner improper" (*d*).

The following cases in the Privy Council which reversed the decisions of the colonial Courts are cited in illustration of this principle.

In *in re Monckton* (*e*), the Chief Justice of the Supreme Court of Prince Edward's Island made an order suspending

(*a*) *Mitchell's Case* (1741), 2 Atk. 173; *in re Wallace* (1861), L. R. 1 P. C. 283.

(*b*) *Leckmere Charlton's Case* (1836), 2 Myl. & Cr. 316; *Watt v. Ligertwood* (1874), L. R. 2 H. L. Sc. 361; *in re Pollard* (1868), L. R. 2 P. C. 106; *Linwood v. Andrews* (1888), 58 L. T. 612; *in re Ramsay* (1868), L. R. 3 P. C. 427; *Smith v. JJ. of Sierra Leone* (1841) 3 Moore P. C. 361; *ex parte Pater* (1864), 9 Cox C. C. 544; *Rainy v. JJ. of Sierra Leone* (1852-53), 8 Moore P. C. 47.

(*c*) *In re Wallace* (1866), L. R. 1 P. C. 283.

(*d*) *In re Wallace, l.c.* See *Reg. v. Marshall* (1855), 4 E. & B. 475.

(*e*) (1837) 1 Moore P. C. 455.

from practice the appellant, who was a barrister and attorney. The ground of the order was that the appellant only pretended to act as a practitioner and kept his name on the rolls of the Court for the purpose of protecting himself against arrest by his creditors. There was no evidence before the Chief Justice in support of this, and the Privy Council rescinded the order.

In *Smith v. Justices of Sierra Leone* (a), a barrister practising in Sierra Leone was fined and struck off the roll of the Court for contempt in refusing to answer in a particular form a question put to him by the Chief Judge; the Privy Council reversed the order striking the barrister off the roll, as there was nothing in what he had done affecting his character (b).

In *in re Downie and Arrindell* (c), the Supreme Court of British Guiana suspended from practising before it a barrister whom it adjudged guilty of contempt; the alleged contempt was being party to the service on a judge by the provost marshal of the court of a petition to the Queen, praying that the Queen would prevent the judge from proceeding to try an action in which he was interested; the Privy Council reversed the order, holding that the Act was not such a contempt as to warrant the order.

In *in re Pollard* (d), a barrister, while engaged in his professional duty before the Supreme Court at Hong Kong, was, without being heard in his defence, adjudged by the Chief Justice to have been guilty of several contempts of Court, in disrespectfully addressing the Chief Justice during the conduct of a cause, and was fined and suspended from practice until the fine was paid; the Judicial Committee of the Privy Council set the order aside and remitted the fine on two grounds—first, that no distinct charge of the alleged offence was stated and no opportunity given of answering

(a) (1841) 3 Moore P. C. 361.

(b) See *Smith v. Justices of Sierra Leone*, 7 Moore P. C. 174.

(c) (1841) 3 Moore P. C. 414.

(d) (1868) L. R. 2 P. C. 106.

the charge; and, secondly, that none of the alleged offences amounted to a contempt of Court.

In *in re Wallace* (a), an advocate, who was also a suitor in the Supreme Court of Nova Scotia, wrote a letter addressed to the Chief Justice reflecting on the judges and the administration of justice in that court; the letter was in such terms as to amount to a contempt of Court, and the Supreme Court made an order suspending the advocate from practice indefinitely; the Judicial Committee of the Privy Council held on appeal that, as the offence was committed by the advocate in his capacity of suitor, and had no connection with his professional character, and did not subject the person committing it to anything like general infamy or imputation of bad character so as to render his remaining in the court as a practitioner improper, it was not competent on the Court to inflict upon him a professional punishment for an act which was not done professionally, and which did not *per se* render him improper to remain as a practitioner of the court; the order was discharged on the ground that it substituted a penalty and mode of punishment which was not the appropriate punishment for the case in question.

In *Newton v. The Judges of the High Court, North Western Provinces* (b), the High Court of North Western Provinces declared an advocate guilty of gross professional misconduct, and suspended him from practice for five years; two charges were brought against the advocate, the first was that he drafted for a client a letter to a firm of merchants asking for an advance of money for carrying on an indigo factory, when the client to the advocate's knowledge meant to apply part of the money, if advanced, to the carrying on of a suit in which the client was engaged, and particularly to the payment of the advocate's fees in this suit; the Judicial Committee of the Privy Council held that the drafting of the letter could not be taken to

(a) (1866) L. R. 1 P. C. 283.

(b) L. R. 4 P. C. 18.

constitute such grave professional misconduct as would justify any part of the sentence passed; the second charge was that the advocate had advised his client to indorse to him a note as administratrix of the estate of a deceased intestate, when, in fact, the client was not administratrix; as regards this, the Court below had found that the advocate believed at the time when he procured this indorsement that the client would in a very short time be in a position legally to assume the character of administratrix; on this finding the Judicial Committee held that, although the advocate had been guilty of a grave irregularity, which was deserving of censure, yet, as the Court below had acquitted him of *malus animus*, his conduct did not deserve the heavy sentence passed upon it; the order suspending the advocate was accordingly discharged.

In *ex parte Renner (a)*, two charges were brought against a barrister practising in the Gold Coast; one charge was that he had drawn a mortgage, and had, with intent to defraud, antedated it, and inserted as consideration the sum of £250 instead of £150; the other charge was that, at the hearing of an interpleader summons, he had put the mortgage in evidence without informing the Court that the date was false; the Supreme Court of the Gold Coast colony, before whom the charges came, acquitted the barrister of the first charge, but found him guilty of the second, and ordered him to be struck off the roll of the Court. The Judicial Committee of the Privy Council held that the second charge fell with the first, as there was no evidence that the barrister had any reason to believe that the mortgagee had not advanced the consideration mentioned in the deed at or before the date it bore, and as it was immaterial to the question at issue in the interpleader proceedings whether the deed was antedated or not; the order striking the barrister off the roll was accordingly reversed.

The following cases are cited as instances of the English

(a) (1897) A. C. 218.

Courts punishing an advocate for contempt by fine or imprisonment.

In *Lechmere Charlton's* case (a), a barrister, who had appeared before a Master in Chancery in support of a petition presented by himself and others, wrote to the Master a letter in threatening terms with the object of causing the Master to alter his opinion; the Lord Chancellor committed him to prison during pleasure (b).

A barrister may be punished for contempt of Court in respect of language used by him in the discharge of his functions as an advocate (c). In *ex parte Pater* (d), a barrister, while defending a person on trial at Quarter Sessions for larceny, was taking an objection to the examination of the prosecuting counsel, when he was interrupted by the foreman of the jury. The barrister thereupon said to the foreman, "You had better not get into collision with me, sir," and in his address to the jury said, "I thank God there is more than one jurymen to determine whether the prisoner stole those articles, for if there was only one, and that one the foreman, from what has transpired to-day there is no doubt what the result would be"; the barrister also told the foreman that he ought to be removed from the box and another put in his place. These expressions were uttered in a loud, threatening, insulting tone and manner, and were accompanied with violent gestures. The deputy-assistant judge, who was presiding at the trial, twice requested the barrister to withdraw these expressions, but the barrister refused to do this, and the deputy-assistant judge thereupon adjudged him to have committed a contempt of Court and fined him £20. An application was made to the Court of Queen's Bench to quash the order inflicting the fine, but

(a) (1836) 2 Myl. & Cr. 316.

(b) See *Watt v. Ligertwood* (1874), L. R. 2 H. L. Sc. 361.

(c) See *Fuller's Case*, 12 Co. 41; *Ex parte Pater* (1864), 9 Cox C. C. 544; 5 B. & S. 299; 33 L. J. M. C. 142; 10 Jur. N.S. 972; 10 L. T. 376. See, as regards contempt of court in the case of courts-martial, The Army Acts, 1881 and 1894 (44 & 45 Vict. c. 58, s. 129; 57 Vict. c. 3, s. 6).

(d) v.s.

the Court held that, though the expressions used were words which counsel might have uttered in the honest discharge of his duty for the sake of vindicating the interests of his client, and if so uttered would have been within the right and privilege of counsel, yet the utterance of such expressions, with the intention to insult the jury, would be an abuse of the privilege of counsel, and might be treated by the judge as a contempt and punished accordingly. The Court of Queen's Bench held, on the facts, that it could not be said that the presiding judge came to a conclusion so unreasonable and wrong that he had not jurisdiction to impose the fine.

In the case of *Linwood v. Andrews* (a), a barrister who was adjudged guilty of knowingly permitting false affidavits to be read in court, was committed to prison for contempt by Kay, J.

The Court of Chancery sometimes punished counsel for prolix, frivolous, and scandalous pleadings (b). The Courts of common law on some occasions took notice of prolix or tricky pleading and vexatious proceedings (c), and on one occasion the Court of Exchequer fined a barrister who had subscribed his name to "tedious and scandalous answers," and ordered that he should thereafter be "for ever disabled to subscribe his name to any bill, answer, or pleading in that Court" (d).

Before the Judicature Act, 1873 (e), pleadings in Chancery, with some exceptions, had to be signed by counsel (f). Now the signature of counsel is not

(a) (1888) 58 L. T. 612.

(b) See Mitford on Pleading, 48; *Emerson v. Dallison* (1660), 1 Rep. in Ch. 194; *Hill's Case* (1603), Cary, 38; *Everet v. Williams* (1725), Lindley on Partnership, 6th ed., 101n.; Oswald on Contempt, 2nd ed., 41, 43, 82.

(c) *Dundass v. Weymouth* (1777), Cowp. 665; *Yates v. Carlisle* (1761), 1 W. Bl. 270, 291; *Rex v. Wheeler* (1761), 3 Burr., at p. 1258.

(d) *Hickman v. Clarke* (1615), 2 Fowl. Exch. Pr. 478.

(e) 36 & 37 Vict. c. 66. See *Duckitt v. Jones*, per Malins, V.C. (1876), 33 L. T. 777.

(f) Mitford on Pleading, 48, 208, 301, 315; see per James, L.J., *Great Australian Gold Mining Co. v. Martin*, 5 Ch. D. 10.

necessary except to pleadings or a special case that have been settled by counsel (*a*). Articles under the Church Discipline Act (*b*) must now be approved and signed by a barrister (*c*).

Interrogatories in writing on attachments in the King's Bench Division must be signed by counsel (*d*).

A litigant is not permitted to sue or defend as a pauper in the High Court, unless he has first laid a case before counsel and obtained counsel's opinion that he has reasonable grounds for proceeding (*e*): the Court may then assign counsel to the litigant; it is contempt of court for counsel to take a fee in an action from a litigant who has been permitted to sue or defend as a pauper (*f*).

Barristers whilst going to or returning from the Supreme Court for the purpose of being engaged on business there are entitled to immunity from arrest on civil process (*g*). A barrister on circuit is privileged from arrest on civil process (*h*), whether he has business or not, and if on circuit is so privileged, as long as the circuit lasts (*i*). The privilege, it

(*a*) R. S. C. 1883, O. xix. r. 4. As to the punishment of a solicitor who puts counsel's name to a pleading without authority, see *Bishop v. Willis* (1749), 5 Beav. 83n.; *Fawcett v. Garford* (1789), Oswald on Contempt, 44; 2 Fowl. Exch. Pract. 480.

(*b*) 3 & 4 Vict. c. 86, s. 7.

(*c*) *Mouncey v. Robinson* (1867), 37 L. J. Eccl. 8; Phillimore, Eccl. Law, ii. 1020.

(*d*) C. O. R. 1886, r. 275.

(*e*) As to appeals, see *Drennan v. Andrew* (1866), L. R. 1 Ch. 300; *ex parte Goldberg* (1893), 1 Q. B. 417; *Mitchell v. New Zealand Loan and Mercantile Co.* (1904), A. C. 149.

(*f*) R. S. C. 1883, O. xvi. r. 27. See *Carson v. Pickersgill*, 14 Q. B. D. 859. In cases to which these rules do not apply, *e.g.* the House of Lords and the Probate and Divorce Division, counsel may take fees from a pauper, see *Richardson v. Richardson* (1895), P., at p. 278; see *Nieroth v. Boileau* (1886), 2 Times R. 478.

(*g*) *Meekins v. Smith* (1791), 1 H. Bl. 636; *Newton v. Harland* (1839), 8 Scott, 70; *Pitt v. Coombs* (1834), 3 N. & M. 212; *Anon.* (1839), 9 L. J. C. P. 176; *Chitty's Archbold*, 1485; *Cordery on Solicitors*, 3rd ed., 238.

(*h*) The case of the *Sheriff of Kent* (1846), 2 C. & K. 197; *Meekins v. Smith* (1791), 1 H. Bl. 636.

(*i*) The case of the *Sheriff of Oxfordshire* (1816), 2 C. & K. 200.

seems, does not extend to barristers going to or returning from Quarter Sessions (*a*).

Barristers if "actually practising" (*i.e.* seeking their living by practising) (*b*), are exempt from serving "upon any juries or inquests whatsoever" (*c*), and from serving the office of constable under 5 & 6 Vict. c. 109 (*d*).

The expressions of counsel uttered in his professional capacity are privileged if pertinent to the matter in issue, and no action will lie against counsel in respect of such expressions (*e*). The privilege of counsel in this respect is the privilege of the client (*f*), the right of "every subject of the realm in all Courts of Justice to assert and defend his rights and to protect his liberty and life by the free and unfettered statement of every fact and use of every argument and observation that can legitimately (*i.e.* according to the rules and principles of law) conduce to this end" (*g*). But the expressions of an advocate are not privileged unless they are relevant to the issue (*h*), or are uttered in the course of judicial proceedings (*i*), or warranted by facts proved or which may be proved (*j*); and the privilege does not cover the separate publication of a speech of counsel which contains defamatory matter (*k*).

There are some old instances of criminal proceedings

(*a*) *Newton v. Constable* (1841), 9 Dowl. 933; 1 G. & D. 408; 2 Q. B. 157; not following *Luntly v. Nathaniel* (1833), 2 Dowl. 51.

(*b*) The case of the *Sheriff of Oxfordshire* (1816), 2 C. & K. 201.

(*c*) 33 & 34 Vict. c. 77, s. 9 and Schedule.

(*d*) See s. 6.

(*e*) *Brook v. Montague* (1606), Cro. Jac. 90; *Wood v. Gunston* (1655), Styles, 462; *Rex v. Skinner* (1772), Lofft, at p. 56; *Hodgson v. Scarlett* (1818), 1 B. & Ald. 232; *Needham v. Dowling* (1845), 15 L. J. C. P. 9; *Mackay v. Ford* (1860), 5 H. & N. 792; 29 L. J. Exch. 404; *Munster v. Lamb* (1883), 11 Q. B. D. 588; *Reg. v. Kiernan* (1855), 5 Ir. C. L. R. 171.

(*f*) See *Reg. v. Kiernan* (1855), 5 Ir. C. L. R. 171.

(*g*) *Butt v. Jackson* (1846), 10 Ir. L. R. 124.

(*h*) *Higginson v. O'Flaherty* (1854), 4 Ir. C. L. R. 125.

(*i*) See *Reg. v. Hutchins* (1858), 7 Ir. C. L. R. 425.

(*j*) *Butt v. Jackson*, *v.s.*; Blackstone Comm., 1st ed., iii. 29.

(*k*) *Ftint v. Pike* (1825), 4 B. & C., at p. 473; *Birch v. Walsh* (1846), 10 Ir. Eq. R. 93.

being taken against counsel for opinions given (*a*), or acts done (*b*) by them as counsel; such cases would hardly be regarded now as authorities.

Forensic costume.—Barristers cannot be heard in court as advocates unless they are robed. Barristers robe in all the sittings in open court of the Supreme Court of Judicature, the House of Lords, the Privy Council (*c*), the County Court and other Courts of record, such as Courts of Quarter Sessions, and in Committees of either House; it is not necessary for barristers to robe for attendance in judges' chambers, and it is not usual to robe in appearing before arbitrators or magistrates in petty sessions.

(*a*) See *Whitelocke's Case* (1613), 2 St. Tr. 766; *Talbot's Case*, *ib.*, 778.

(*b*) *Rex v. Cook* (1660), 5 St. Tr. 1078, 1091; *Case of Privilege of Parliament* (1675), 6 St. Tr. 1146. See Hargrave's Note to *Whitelocke's Case*, 2 St. Tr. 766.

(*c*) Foss's Judges, vi. 232; Dugdale Orig., 321.

CHAPTER V.

COUNSEL AND SOLICITOR.

ONE peculiarity incident to the position of counsel in England is the intervention of a solicitor between counsel and client. In all other professions but that of a barrister practitioners may accept work directly from those that need their services; but the usage and etiquette of the profession of a barrister require in all but a few exceptional cases that counsel should not undertake work offered to him by any one but a solicitor (*a*). The rule prevails in all civil contentious matters and in all criminal business, with the one exception that, at the Assizes, the Central Criminal Court, and Quarter Sessions (*b*), a prisoner may instruct counsel directly "from the dock." The rule also applies to non-contentious business with some exceptions, the exact extent of which is not clearly defined; among such exceptions seem to be the preparation of a will (*c*), work before parliamentary committees before which counsel are instructed by parliamentary agents who need not be solicitors, and proceedings at local inquiries under the Local Government Acts, the

(*a*) See *Thompson v. Maskery* (1882), 73 L. T. (newsp.) 401; Pulling's Law of Attorneys, 12; Annual Statement of the General Council of the Bar, 1896-97, 11, 1899-1900, 5, 1902-03, 11. As to instructions received by solicitors not practising in England, see Annual Statement of the General Council of the Bar, 1902-03, 11.

(*b*) Not at a petty sessional court, Annual Statement of the General Council of the Bar, 1900-01, 7.

(*c*) See Report of the Professional Purposes Committee of the Incorporated Law Society, Annual Statement of the General Council of the Bar, 1902-03, 9.

Public Health Acts, or the Light Railways Act; at such inquiries, it is said, counsel may accept briefs from clerks to local authorities, although such clerks are not solicitors (a).

The usage requiring that counsel should be instructed by a solicitor is not enforceable by law, but, in so far as it relates to litigation, it has been approved by the bench as conducing to the benefit of suitors and to the satisfactory administration of justice (b). The usage is in accordance with the respective rights of barristers and solicitors. The retainer of a solicitor to conduct an action constitutes him the agent of the client throughout its course, but a barrister, when acting in his professional capacity, is not the agent of the client at all (c), and only acts for the client at some particular stages, when his assistance is secured by the delivery of instructions to advise or draw pleadings, or to appear as an advocate (d). No one but a properly admitted solicitor can "sue out any writ or process or commence, carry on, solicit, or defend any action, suit, or other proceeding in any court in England, or act as a solicitor in any cause, matter, or suit, civil or criminal" (e). A barrister, therefore, cannot commence an action for a client or carry on or defend one. No one but a litigant in person or a solicitor can do this. It follows that, when an action is to be instituted, a litigant who does not wish to conduct it himself must retain a solicitor to commence and conduct it for him, or, if the litigant is a defendant, to defend it for him. The solicitor when so retained has the conduct of the whole proceedings, and at the stages at which the assistance of counsel is advisable or indispensable, has authority as

(a) Annual Statement of the General Council of the Bar, 1902-03, 9; *Thompson v. Maskery* (1882), 73 L. T. (newsp.) 401.

(b) *Doe d. Bennett v. Hale* (1850), 15 Q. B. 171; *Hobart v. Butler* (1859), 9 Ir. C. L. R., at p. 172.

(c) *Per Best, C.J., Colledge v. Horn* (1823), 3 Bingham, at p. 121; *Matthews v. Munster* (1887), 20 Q. B. D., at p. 142; *Reg. v. Williamson* (1890), 59 L. J. Q. B., at p. 494, *per Day, J.*

(d) See *Richardson v. Peto* (1840), 1 M. & Gr. 896; 9 Dowd, P.C. 73.

(e) 6 & 7 Vict. c. 73, s. 2.

the client's agent, to instruct counsel and to pay counsel's fees (a). When a litigant conducts or defends an action himself, there is no rule of law requiring him to employ a solicitor to instruct counsel. This was decided in *Doe d. Bennett v. Hale* (b). In that case the defendants had appeared to the process in person, but at the trial, one of them instructed counsel directly. Patteson, J., inquired if any attorney was present for either of the defendants, and being informed that there was no attorney present for either, but that counsel had received instructions from one of the defendants, he ruled that neither defendant could appear by counsel without an attorney, and refused to allow the counsel who was instructed by one defendant to examine or cross-examine witnesses or to address the jury. On a verdict being found for the plaintiff, a new trial was granted by the Court of Queen's Bench, on the ground of the ruling of Patteson, J. Lord Campbell, C.J., in delivering judgment, laid down that there was no rule of law to prevent a defendant in a civil suit who has appeared to the process in person from having the assistance of counsel instructed by himself without an attorney, but expressed his opinion that, in the interests of the suitors and of the satisfactory administration of justice, the understanding in the profession that a barrister ought not to accept a brief in a civil suit, except from an attorney, should be generally acted upon, and he hoped that his decision would not alter the usage which had prevailed upon the subject for more than a century (c). It is submitted that the ruling of Patteson, J., was wrong for another reason, viz. because he inquired into the authority under which the counsel for one of the defendants purported to act (d).

It follows from the interposition of the solicitor between counsel and client, that counsel looks for his fees to the

(a) *Hobart v. Butler* (1859), 9 Ir. C. L. R. 157.

(b) (1850) 15 Q. B. 171.

(c) See *Hobart v. Butler* (1859), *per* Pigot, C.B., 9 Ir. C. L. R. 172.

(d) See *Murphy v. Richardson* (1850), 13 Ir. L. R. 430.

solicitor and not to the client (*a*). Counsel, on a brief being delivered, can insist on the fees being paid with the brief (*b*). It has been laid down that fees ought to be paid when a brief is delivered (*c*). If counsel does not choose to insist on payment of his fees with the brief, he has nothing but the solicitor's honour to look to (*d*). The reason given for the ruling, that fees ought to be paid when a brief is delivered is, that counsel ought not to depend for his fees upon the result of the proceedings (*e*). A promise to pay counsel's fees according to the event of a cause amounts to maintenance (*f*). A fee ought not to be marked on counsel's brief after the litigation in respect of which the brief was delivered has been terminated (*g*). To say of a barrister that he had allowed the fee marked upon his brief to be increased, after the case had been heard and determined, is a slander on a barrister in the way of his profession and actionable *per se* (*h*).

It is irregular for counsel to receive for professional work any sum of money, except for stated and specific fees for particular matters; counsel ought not for such work to receive money generally on account without specifying the cause and matter, and each particular item (*i*).

(*a*) *Re Wilton* (1843), 13 L. J. Q. B. 17; *in re Seal* (1893), 37 Sol. Jo. 685. When a solicitor acts as London agent for a country solicitor, it is the London agent that is responsible to counsel for his fees, *in re Nelson* (1885), 30 Ch. D., at p. 10.

(*b*) *In re Le Brasseur and Oakley* (1896), 2 Ch., at p. 494; *Morris v. Hunt* (1819), 1 Chitt. 544.

(*c*) *Morris v. Hunt*, v.s.; *Hobart v. Butler* (1859), 9 Ir. C. L. R., at p. 166.

(*d*) *In re Le Brasseur and Oakley*, v.s.; *in re Cockayne* (1884), 19 L. J. (newsp.) 500, *per* Lord Esher, M.R.

(*e*) *Morris v. Hunt*, v.s.

(*f*) *Penrice v. Parker* (1673), Finch, 75.

(*g*) *Carson v. Pickersgill* (1885), 14 Q. B. D., at p. 868; *Snow v. Etty* (1887), 22 L. J. (newsp.) 292. As to the alteration of fees after the brief has been delivered, see Tenth Annual Statement of the Bar Committee, p. 2; as to refreshers, see, *post*, p. 141, Annual Statement of the General Council of the Bar, 1903-04, 14.

(*h*) *Snow v. Etty* (1887), 22 L. J. (newsp.) 292.

(*i*) See *in re Smith* (1841), 4 Beav., at p. 317.

A barrister cannot recover his fees by action or any legal process from the solicitor who instructs him (*a*). In a case where a firm of solicitors had acted for a barrister, the taxation of the solicitor's bill was ordered in the common form under which credit is to be given for all sums of money received by the solicitors on account of the client; it was held that the solicitors were not bound to account for moneys received by them in respect of fees due from them to the client as counsel in matters not connected with the bill of costs (*b*).

But when a solicitor has received a specific sum from his client to pay counsel's fees in non-litigious business and admits such receipt, counsel have been allowed to prove in the bankruptcy of the solicitor for such fees (*c*). So when a barrister made an application in the bankruptcy of a solicitor that the bankrupt's trustee might be directed to pay to the applicant certain fees out of a sum received by the trustee in respect of the bankrupt's bill of costs, an order was made that the registrar should inquire what fees had been received by the trustee, and whether any, and, if so, which, of such fees had been paid by the bankrupt to the applicant. The right of the applicant to an order for payment of the fees, if they had been received and not paid, does not seem to have been questioned (*d*). Where a solicitor who has received money for counsel's fees dies, and his estate is being administered by the Court, counsel have been, it is said, admitted to prove in the administration for such fees (*e*).

When fees are paid to counsel, a usual mode of acknowledging the payment is for counsel to endorse the brief with his signature, or, if he is a King's Counsel, with his

(*a*) *Moor v. Row* (1630), 1 Rep. in Ch. 38; *in re May* (1858), 4 Jur. N.S. 1169; *in re Le Brasseur and Oakley* (1896), 2 Ch. 487.

(*b*) *In re Le Brasseur and Oakley* (1896), 2 Ch. 487.

(*c*) *In re Hall* (1856), 2 Jur. N.S. 1076.

(*d*) *Ex parte Colquhoun, in re Clift* (1890), 38 W. R. 688.

(*e*) See L. J. (newsp.), 1884, 309; but see *Mostyn v. Mostyn* (1870), L. R. 5 Ch. 457.

initials under the amount of the fees marked on the brief or instructions (a). An acknowledgment of the payment of counsel's fees in this or any other manner does not require a receipt stamp (b), for it is not a receipt for money within the Stamp Act (c). Such fees when acknowledged (d) form part of the costs of the action, and as such may, if allowed on taxation, be recovered by legal process from the opposite party by the successful litigant to whom costs have been awarded (e); such costs as are not recovered from the other side, may, subject to taxation as between solicitor and client, be recovered by the solicitor from his client.

If counsel gives an acknowledgment purporting to show that the fees have been paid when in fact they have not, and the solicitor by means of such acknowledgment obtains an order for payment by the unsuccessful party of the taxed costs including the amount of counsel's fees, the Court will not interfere at the instance either of client or of counsel, to compel the solicitor to pay the fees to counsel (f). Such an act is on both sides an irregular and improper proceeding, out of which no remedy can arise (g). When money for counsel's fees has been received by a solicitor and not paid to counsel, the Court will only use its summary jurisdiction over the solicitor in cases of fraud; the jurisdiction is punitive only and will not be exercised for the purpose of compelling a solicitor to pay fees to counsel (h). The mere non-payment of fees due to counsel which are charged in a solicitor's bill to the client is not

(a) See L. J. (newsp.), 1883, 642; Cordery on Solicitors, 3rd ed., 144.

(b) *In re Beavan* (1854), 23 L. J. Ch. 536.

(c) 54 & 55 Vict. c. 39, s. 101 and First Schedule.

(d) R. S. C. 1883, O. lxx. r. 27, subr. 52.

(e) *Morris v. Hunt* (1819), 1 Chitt. 551.

(f) *Angell v. Oodeen* (1860), 29 L. J. C. P. 227; *in re Cockayne* (1884), 19 L. J. (newsp.), 500; *in re Hickie* (1868), 1 Ir. L. T. & Sol. Jo. 795. See *Hobart v. Butler* (1859), 9 Ir. C. L. R. 157.

(g) See Annual Statement of the General Council of the Bar, 1901-02, 6.

(h) See *in re F.* (1883), 18 L. J. (newsp.), 352; *in re Cockayne*, v.s.; but see *in re a Solicitor* (1894), 63 L. J. Q. B. 397.

of itself a sufficient circumstance to warrant an order for referring to taxation a bill which had been delivered more than twelve months (a).

A solicitor is not liable to his client for absence, neglect, or want of attention of counsel whom he instructs (b). But merely to hand a brief to counsel is not to instruct him. The solicitor himself, or some competent clerk, must be present in Court to explain the subject matter of the brief, and to give any information that counsel may require; if a solicitor fails so to instruct counsel, then, though the brief has been delivered and counsel is present at the trial, the solicitor is liable (c). A solicitor is not answerable for error in judgment upon points such as are usually entrusted in counsel, e.g. the sufficiency of the evidence of a document, but on a matter where the law would presume the solicitor to have knowledge, he cannot shift responsibility from himself by consulting counsel (d). A solicitor is justified in acting by the advice of counsel in opposition to the wishes of his client, e.g. where a client wished his solicitor to insert a number of letters in an affidavit, and counsel, deeming them irrelevant, declined to insert them, the solicitor was held not liable (e). The question of calling or not calling witnesses at a trial is one entirely for counsel (f), and where counsel did not call certain witnesses, and the client sued the solicitor for negligence, Pollock, C.B., laid down that the solicitor was not liable (g). The drafting of pleadings is also a matter which generally falls within the province of counsel, and a solicitor is not liable for negligence for proceeding with an action which ultimately fails owing to an error in pleading when the pleading is drawn by counsel (h). On

(a) *Re Wilton* (1844), 13 L. J. Q. B. 17.

(b) *Lowry v. Guilford* (1832), 5 C. & P. 234.

(c) *Hawkins v. Harwood* (1849), 4 Exch. 503.

(d) *Godefroy v. Dalton* (1830), 6 Bingh. 460.

(e) *Cates v. Indermaur* (1858), 1 F. & F. 259.

(f) See *Wallace v. Cook*, *Times*, June 15th, 1903.

(g) *Hatch v. Lewis* (1861), 2 F. & F. 467. See *Hall v. Stothard* (1816), 2 Chitt. 267.

(h) *Manning v. Wilkin* (1848), 12 L. T. O. S. 249.

a matter where there is a reasonable doubt and there is no want of ordinary care and knowledge on the part of a solicitor, and he acts under the advice of counsel, the solicitor is not liable to the client (a). Thus where an action was brought on an agreement which was drawn by a conveyancer in considerable practice, who advised that the agreement was valid, and the action failed because the agreement was held to be void on the ground of champerty, Tindal, C.J., held at *nisi prius* that the solicitor for the plaintiff was entitled to recover from him both the costs of preparing the agreement and of bringing the action (b). But if a solicitor does not supply counsel with material facts of which he is aware, the opinion of counsel will not protect him from an action of negligence. Thus where a solicitor who was employed to investigate the title to an estate took the opinion of counsel, but omitted to state in the case for opinion certain deeds which materially affected the title, and counsel advised that the title was a good one, and on the faith of the opinion so given, the vendee concluded the purchase, but the title afterwards turned out to be imperfect, it was held that the solicitor was liable in an action of negligence (c). In an action against a solicitor or any one not a solicitor for a malicious or fraudulent proceeding, it is not enough to excuse the defendant that he acted on counsel's opinion unless he also shows a case fairly stated and advice obtained *bonâ fide* and properly pursued (d). An action was brought against a solicitor for fraudulently obtaining on behalf of a third party, who pretended to be the plaintiff's partner, debts due to the plaintiff; the defendant had upon oral statements and by suppression of material facts known to himself obtained counsel's opinion that there was a partnership, and that the proper course

(a) *Potts v. Sparrow* (1834), 6 C. & P. 749.

(b) *Ib.*

(c) *Ireson v. Pearman* (1825), 5 D. & R. 687; 3 B. & C. 799.

(d) *Andrews v. Hawley* (1857), 26 L. J. Exch. 323. See *in re Clark*, 1 De G. M. & G. 43; 21 L. J. Ch. 20.

was to write to the firm's customers on behalf of the firm warning them not to pay to the plaintiff; the defendant had not followed this advice, but had written to the customers on behalf of the plaintiff and the pretended partner requesting payment; it was held that to have obtained counsel's opinion in this way and to have acted on it as the defendant did was no answer to the action and that the proper question for the jury was whether the letters were fairly written in consequence of counsel's opinion, or whether they were written really in order to induce the customers to believe that the plaintiff actually authorised the defendant to write such letters and to receive payment (a).

(a) *Andrews v. Hawley* (1857), 26 L. J. Exch. 323.

CHAPTER VI.

COUNSEL AND CLIENT.

1. *Incapacity of Client and Counsel to contract.* There are some exceptional features incident to the relation of counsel and client, viz. both counsel and client are mutually incapable of entering into any contract of hiring in reference to the services of counsel; counsel cannot sue the client for his fees; and the client cannot sue counsel for negligence.

(a) *Counsel cannot sue his Client for his fees.* The general rule of law is that a person who is employed for reward to do work for another has a right of action to recover his reward for such labour, and to this rule there are but two exceptions, viz. members of a college of physicians when prohibited by a bye-law of their college from suing (a), and barristers. The employment of a barrister is a purely honorary one in the sense that it confers on him no legal right to remuneration for his services (b); hence the remuneration of a barrister is called *honorarium* as opposed to *merces* (c). No binding contract can be entered into between counsel and client in respect of the services of counsel, and it follows that counsel, on the one hand, cannot sue his client for fees, and the client, on the other hand, has no legal remedy against his counsel for non-attendance or

(a) See 49 & 50 Vict. c. 48, s. 6.

(b) *Poucher v. Norman* (1825), 3 B. & C. 744; see *Morris v. Hunt* (1819), 1 Chitt. 551; *Veitch v. Russell* (1842), 3 Q. B., at p. 936.

(c) Sir John Davys, Reports, Preface; Co. Lit. 295a; *Thornhill v. Evans* (1742), 9 Mod. 331; 2 Atk. 330.

negligence (*a*), or, it would seem, for any breach of duty short of fraud, collusion, betrayal of secrets, undue influence, or using the position of counsel to gain some collateral advantage for himself to the detriment of the client (*b*). The fees of a barrister ought to be paid beforehand, and are not recoverable from the client any more than from the solicitor (*c*), either directly or indirectly by any legal process (*d*).

A barrister may, if he chooses, receive a brief on the terms that he is to receive no fee at all in respect of it. Indeed, when a litigant has been admitted to sue or defend as a pauper in the High Court, and counsel has been assigned to him, the counsel so assigned cannot refuse his assistance unless he satisfies the Court or judge that he has some good reason for refusing (*e*), and if the counsel assigned takes or agrees to take, or seeks to obtain any fee for the conduct of the business of the pauper, he is guilty of a contempt of Court (*f*).

A judge in criminal trials, particularly in cases of murder, often requests a barrister to give his honorary services to a prisoner (*g*). In cases to which the Poor Prisoners Defence Act, 1903 (*h*) applies, the expenses of the defence, including the fees of counsel, are paid in the same manner as the expenses of a prosecution in cases of indictment for felony.

(*a*) *Turner v. Phillips* (1792), Peake, N. P. 122; *Fell v. Brown* (1792), *ib.*, 96; *Swinfen v. Lord Chelmsford* (1859), 1 F. & F. 619; (1860) 29 L. J. Exch. 382; *Hobart v. Butler* (1859), 9 Ir. C. L. R. 157; *Mulligan v. McDonagh* (1860), 2 L. T. N.S. 136; *Robertson v. Macdonogh* (1880), 6 L. R. Ir. 433.

(*b*) See p. 60.

(*c*) See *ante*, p. 46.

(*d*) See *Thornhill v. Evans* (1742), 9 Mod. 331; 2 Atk. 330.

(*e*) R. S. C. 1883, O. xvi. r. 26.

(*f*) R. S. C. 1883, O. xvi. r. 27. See *Carson v. Pickersgill* (1885), 14 Q. B. D. 859. The rules do not apply to the Probate and Divorce Division, and there is nothing to prevent counsel or solicitor in that division receiving fees from a pauper, *Richardson v. Richardson* (1895), P. *per* the President, at p. 278.

(*g*) See *Reg. v. Fogarty* (1851), 5 Cox C. C. 161.

(*h*) 3 Edw. VII. c. 38.

In one case (*a*) it was attempted to argue that as no one is liable at law to pay counsel at all, no charge for counsel should be allowed on taxation. Bayley, J., in deciding against this contention said that the reason why counsel could not maintain an action for their fees was "because it is understood that their emoluments are not to depend upon the event of the cause, but that their compensation is to be equally the same whether the event be successful or unsuccessful. They are to be paid beforehand, because they are not to be left to the chance whether they shall ultimately get their fees or not; and it is for the purpose of promoting the honour and integrity of the bar, that it is expected all their fees should be paid at the time when their briefs are delivered. That is the reason why they are not permitted to maintain an action. It is their duty to take care, if they have fees, that they have them beforehand, and therefore the law will not allow them any remedy if they disregard their duty in that respect . . . but is it to be supposed that men are to waste their lives to qualify themselves for their profession, without receiving any emolument? That never can be imagined; and the constant course which has been adopted, shows that it never could be so understood. If this is not the right rule, the Courts of Westminster Hall have been in error for centuries, because they have been in the constant habit of allowing to plaintiffs, when they succeed, the fees of counsel on the one hand, and to the defendant the fees of their counsel when they succeed, on the other hand" (*b*).

The case of *Morris v. Hunt* was followed by the Irish Court of Exchequer in *Hobart v. Butler* (*c*), which was an action for money had and received, brought by a barrister against a client for whom he had acted in a Chancery suit. The client had succeeded in the suit and obtained an order

(*a*) *Morris v. Hunt* (1819), 1 Chitt. 546, 550.

(*b*) The prohibition of champerty in 28 Edw. I. c. 11 saves the rights of a litigant "to have counsel of pleaders or of learned men in the law for their fee."

(*c*) (1859) 9 Ir. C. L. R. 157.

for the payment of costs out of a fund in Court. While the costs were being taxed the clerk to the defendant's solicitor induced the plaintiff, whose fees had not been paid, to sign his brief as if the fees marked thereon had been paid, the clerk expressly promising that as soon as the defendant recovered the money out of Court, the fees should be paid; the defendant by this means obtained out of the fund in Court the amount of the taxed costs, including the fees marked on the briefs; these fees were not paid, and the action was brought to recover them. On the trial, the jury, by the direction of the judge, found a verdict for the defendant, and the Irish Court of Exchequer refused to disturb the verdict, holding that there was no express authority given to the solicitor to enter into the contract on which the plaintiff relied; that there was nothing in a solicitor's position from which such an authority could be implied in law, or ought to be inferred in fact, so as to bind the client by such an undertaking, that the solicitor under his general retainer, had authority to engage counsel and to pay counsel's fees, and could recover them when paid from his client, but that, as fees ought to be paid to counsel when a brief is delivered, a solicitor had no authority to promise to pay them afterwards.

Even an express promise by the client himself to pay fees to counsel has no binding effect, and counsel cannot sue the client on such a promise. The leading case on this point is *Kennedy v. Broun* (a), which arose out of the litigation in *Swinfen v. Swinfen* (b). The defendants in *Kennedy v. Broun* were Mrs. Broun, formerly Mrs. Swinfen, the plaintiff in *Swinfen v. Swinfen*, and her second husband. The plaintiff was a barrister who had acted for Mrs. Swinfen in the new trial of the issue in *Swinfen v. Swinfen*, and also in other proceedings relating to the same litigation which resulted in Mrs. Swinfen establishing her claims to the Swinfen Hall estates. The action was on an

(a) (1862) 13 C. B. N.S. 677; 32 L. J. C. P. 137.

(b) See p. 78.

account stated with Mrs. Broun, *dum sola*. It was proved that the plaintiff had received no fees from her, that she repeatedly promised to remunerate him, and that after the end of the litigation she admitted that the amount due was £20,000, and she promised to pay him that sum. A verdict being found for the plaintiff for £20,000, a rule *nisi* was obtained to set aside the verdict and enter it for the defendant, and the Court of Common Pleas made the rule absolute and set aside the verdict. Erle, C.J., delivered the judgment of the Court, and after reviewing and distinguishing the older cases laid down that "a promise by a client to pay money to counsel for his advocacy, whether made before, or during, or after the litigation has no binding effect," and that "the relation of counsel and client renders the parties mutually incapable of making any legal contract of hiring and service concerning advocacy in litigation," and that "the requests and promises of the defendant and the services of the plaintiff created neither an obligation nor an inception of obligation, nor any inchoate right whatever capable of being completed and made into a contract by any subsequent promise."

In the case of *Broun v. Kennedy* (a), the plaintiff, Mrs. Broun (formerly Mrs. Swinfen), in consideration of the services which the defendant, Mr. Kennedy, had performed for her, as counsel in defending and establishing her title to the Swinfen Hall estates, and also of the esteem and friendship which she had for him, conveyed to him the whole of the Swinfen Hall estates, subject to a life interest. Romilly, M.R., decreed that the deed should be delivered up and cancelled, holding that the transaction could not stand as a voluntary gift owing to the confidential relations which existed between Mrs. Swinfen and her counsel, and the influence that he had acquired over her. He also held, following *Kennedy v. Broun*, that the previous promise of the plaintiff to give the defendant £20,000 for his services were insufficient to support the deed as founded on contract,

(a) (1863) 33 L. J. Ch. 71, 342.

and that the deed could not be upheld as executed in the fair performance of a moral obligation. This decision was affirmed on appeal by Knight-Bruce and Turner, L.JJ.

The decision in *Kennedy v. Broun* (a) does not affect to deal with fees for services rendered by a barrister in non-litigious matters, but the principles laid down in that case seem equally applicable to all work done by a barrister as a barrister (b).

A promise to pay fees to counsel, according to the event of a cause, exposes the parties to the penalties of maintenance (c). A bargain, securing to a barrister a share in the proceeds of litigation, is void for champerty, and any security given for the performance of such a bargain is liable to be set aside (d).

In *Thornhill v. Evans* (e), a barrister, who had also lent money to his client on a mortgage, had a clause inserted in the mortgage-deed by which the mortgagor promised, when he paid off the mortgage, to pay to the mortgagee six months' interest over and above the interest then due. The pretence for the clause was that the mortgagor had agreed to pay the extra interest by way of gratuity for services formerly rendered to him by the mortgagee as barrister; it does not appear that these services had any reference to litigation. Lord Hardwicke, L.C., relieved the mortgagor from his promise on the ground that "the Court will not suffer a counsellor to bring an action for his fees, for they are rather honorary than *mercedes*, and he must take them when he gives counsel and no bill will lie in this Court for his relief if he do not," and that the Court will not suffer counsel, "if he happens to be a mortgagee, to insist upon more than the legal interest under pretence of gratuity for business formerly done in the way of a counsel. To admit

(a) 13 C. B. N.S. 677.

(b) See Pollock on Contract, 7th ed., 670; Cordery, Law relating to Solicitors, 3rd ed., 141.

(c) *Penrice v. Parker* (1673), Finch, 75.

(d) See *Skapholme v. Hart* (1680), Finch, 477.

(e) (1742) 9 Mod. 331; 2 Atk. 330.

such a clandestine way of coming at fees is of much worse consequence than the other."

In *Mostyn v. Mostyn* (a), a barrister attempted to carry in against the estate of a deceased client a claim for the balance of fees due for non-litigious work; part of the fees had been paid by the solicitor who instructed the claimant, and it was contended that the part payment bound the client as by an express promise to pay the rest; the claim was rejected on the ground that the client had in fact paid the whole of the fees to the solicitor; but Giffard, L.J., went on to say that even if there had been no such payment by the client, he would have come to the same conclusion, and that a solicitor cannot pledge his client's credit to counsel and that part payment by a solicitor cannot convert counsel's claim which, it was admitted, is only a moral one, into a legal debt; Giffard, L.J., followed the judgment in *Kennedy v. Brown* (b), and applied it to the case before him, and added, "such applications as the present have, I believe, never succeeded; and, speaking for myself, I may add that I hope never to see the day when a counsel coming into Court to enforce his claim for fees as such against the client will be successful."

The incapacity of a barrister to sue for his remuneration extends, it seems, to all cases of work done by a barrister as a barrister, even if the work is done outside England. If an English barrister were to accept a retainer to appear in his professional capacity and plead out of England in a country by the laws of which counsel could sue for their fees, he would not by virtue of such laws have in the courts of such a country, any more than in the courts of his own country, a right of action for his fees; if he were to bring any such action, his client would have a conclusive defence on the ground that the barrister was employed as a member of the English bar and by necessary implication upon the same terms with reference to remuneration as those upon

(a) (1870) L. R. 5 Ch. 457.

(b) 13 C. B. N.S. 677.

which members of the English bar are understood to practise in England (a).

The incapacity of a barrister to sue for his remuneration is confined to business which is within the ordinary scope of the practice of a barrister, that is, to business as regards which the relation of counsel and client can exist. A barrister who is employed to do work which is not within the ordinary scope of a barrister's practice can contract and sue for his remuneration; thus in *Egan v. Guardians of Kensington Union* (b), which was an action by a barrister on an express contract for fees for work and labour done by him as returning officer at an election of guardians of a union, the defendants objected that a barrister could not recover on such a contract, but that the fees must be regarded as purely honorary; Lord Denman, C.J., overruled the objection, holding that the professional character of the plaintiff did not affect his rights under the special contract, and a verdict was found for the plaintiff; the case came before the Court on a motion to alter the amount of damages, but the correctness of the ruling of Lord Denman was not questioned.

An arbitrator may recover his fees by action on an express promise and also it seems on an implied promise to pay them (c), but it is not clear whether a barrister who is an arbitrator can do so (d).

A barrister who has taken evidence under a commission is justified in declining to produce the evidence until his fees for taking it are paid (e).

As regards drafts settled by counsel, Lord Hardwicke said in *Stanhope v. Roberts* (f), that counsel have a right to them to make use of them as precedents but not

(a) *Per* Lord Watson, *Reg. v. Doutré* (1884), 9 App. Cas., at p. 752.

(b) (1841) 3 Q. B. 935n.

(c) See *Hoggins v. Gordon* (1842), 3 Q. B. 466; *Crampton and Holt v. Ridley* (1887), 20 Q. B. D. 48.

(d) See *per* Smith, J., *Crampton and Holt v. Ridley*, v.s., at p. 52.

(e) *Smith v. Hallen* (1861), 2 F. & F. 678.

(f) (1741) 2 Atk. 214.

to detain them when any party concerned may have any benefit arising from an inspection of them. It does not appear that counsel have any lien on papers left with them (a).

(b) *Immunity of a barrister from action by the client for negligence, etc.*—A barrister, provided he acts honestly in the discharge of his duties, is not liable to an action by his client for negligence, want of skill, discretion or diligence; no action lies against counsel for any act done honestly in the conduct of an action (b); a barrister by accepting a brief undertakes a duty, but does not enter into any contract express or implied (b); the principle which prevents a barrister from suing the client, *i.e.* the mutual incapacity of barrister and client to contract with reference to his fees also prevents the client from suing the barrister (c). If a barrister receives a brief in a cause and is paid the fees but does not attend at the trial, no action can be brought by the client against the barrister to recover either the fees (d), or damages for non-attendance (e). In *Fell v. Brown* (f), an action was brought against a barrister for unskillfully settling a bill for the plaintiff in a Chancery suit; the bill had been referred to the Master for scandal and impertinence, and the plaintiff had been obliged to pay the costs of the reference; on the trial of the action against the barrister, Lord Kenyon, C.J., expressed a strong opinion that the action was not maintainable and the plaintiff submitted to a non-suit.

The leading case on this point is *Swinfen v. Lord Chelmsford* (g), which arose out of the abortive com-

(a) See *Steadman v. Hockley* (1846), 15 M. & W. 553; 15 L. J. Exch. 332; *in re Williams* (1861), 9 W. R. 393.

(b) *Swinfen v. Lord Chelmsford* (1860), 29 L. J. Exch. 382.

(c) *Robertson v. Macdonogh* (1880), 6 L. R. Ir. 433.

(d) *Turner v. Phillips* (1792), Peake, N. P. 122.

(e) *Robertson v. Macdonogh* (1880), 6 L. R. Ir. 433; *Mulligan v. McDonagh* (1860), 2 L. T. N.S. 136.

(f) (1792) Peake, N. P. 96.

(g) (1859) 1 F. & F. 619 (at *nisi prius*); (1860) 29 L. J. Exch. 382 (in the Court of Exch.).

promise in *Swinfen v. Swinfen* (a), and was an action by the plaintiff in *Swinfen v. Swinfen* against her former counsel to recover damages for entering into the compromise; fraud was charged in the declaration but was not proved at the trial, and it was contended for the plaintiff that the allegation of fraud was not essential and that the action was maintainable against counsel for acting wilfully without the authority of his client. Pollock, C.B., directed the jury that the law requires of counsel nothing but the honest discharge of his duty to the best of his judgment, that, if he intends to act honestly, and if he means what he does for the benefit of his client, he is not responsible to the client in damages for anything he does; the question whether the defendant did so act was left to the jury, who were told to find for the defendant, if they thought he acted honestly, and if not for the plaintiff; the jury found for the defendant. A motion for a new trial was refused by the Court of Exchequer who held that no action would lie against an advocate at the English bar for any act done honestly in the conduct of a cause.

The immunity of counsel from an action, provided he acts honestly, is not confined to litigation, but extends to all cases where the relation of counsel and client exists (b).

2. *Confidential position of Counsel*.—The employment of counsel places him in a confidential position, and imposes upon him the duty not to communicate to any third person the information which has been confided to him as counsel, and not to use either such information or his position as counsel for his own advantage and to the detriment of his client (c). This duty continues after the relation of counsel and client has ceased. The Courts will

(a) See p. 78.

(b) *Perring v. Rebutter* (1842), 2 Moo. & Rob. 429.

(c) See *per* Lord Plunkett, *l.c.*, *Carter v. Palmer* (1839), 1 D. & Wal. 743. See also for the form of an indictment against counsel for betraying his client's secrets to the opposite party and taking fees of both sides, *Rex v. Walker*, Tremaine's Pleas of the Crown, 261; *cp.* Hawkins' Pleas of the Crown, bk. ii. c. 22, s. 30, II. 219 (8th ed.).

interfere by injunction to prevent counsel from disclosing the secrets of the client which have been communicated to him in professional confidence, and will set aside any deed or security or transaction by which a barrister has, through making use of the confidence which has been reposed in him, gained for himself an advantage to the detriment of his client (*a*). In the case of *Carter v. Palmer* (*a*), the plaintiff, a barrister, had acted as counsel and confidential adviser to the defendant for several years, and had thereby acquired an intimate knowledge of the defendant's estates and liabilities, and particularly of certain doubtful charges on the defendant's property on which he had himself professionally advised. After the plaintiff had ceased to be counsel for the defendant, the plaintiff used the information which he had acquired to buy up at a low price the doubtful charges and to defeat negotiations for their compromise of which he was aware, and in which at one time he had been professionally engaged. The plaintiff then brought an action to enforce these charges, and the defendant filed a cross bill, asking for relief on the ground of the confidential position of the plaintiff. Lord Plunkett, L.C., declared the plaintiff to be a trustee for his former client of the charges so purchased by him, except as to the sums which the plaintiff had actually spent in the purchase. The plaintiff appealed to the House of Lords, but Lord Cottenham, L.C., in delivering the judgment of the House, dismissing the appeal, held that the plaintiff had acted as agent as well as counsel, and based his judgment on the disability under which an agent lies to gain for himself in any business in which he is engaged, an advantage at the expense of his principal (*b*).

In *Thornhill v. Evans* (*c*), where a barrister had abused the trust reposed in him by obtaining for himself from his client the grant of a stewardship of a manor in fee, without explaining to the client the meaning of the words "in fee."

(*a*) (1839) 1 D. & Wal. 722; 1 Ir. Eq. R. 289; 8 Cl. & F. 657.

(*b*) 8 Cl. & F. 657.

(*c*) (1742) 9 Mod. 331; 3 Atk. 330.

Lord Hardwicke, L.C., ordered the barrister to give up the grant.

In *Segrave v. Kirwan* (a), the defendant, a barrister, acting on instructions from a client, drew a will in which he was appointed sole executor. The will contained no disposition of personalty, and the defendant did not inform his client, and stated at the trial that he was ignorant of the effect of such a will (before 11 G. IV. & 1 W. IV. c. 40), namely that the personalty would pass to the executor. The next of kin of the testator filed a bill against the executor, praying that they might be declared entitled to the residue of personalty after payment of debts and funeral expenses; fraud was alleged in the bill but was not proved at the trial. Sir Anthony Hart, L.C., of Ireland, held that there was no imputation on the character of the defendant, but also held on principles of public policy that the defendant, as confidential legal adviser of the testator, ought to have informed his client of the legal effect of the will, that having been consulted as a lawyer, he could not set up his ignorance of law as a defence, that he could not be allowed to retain the personalty for his own benefit, and that he must be declared a trustee of it for the plaintiffs.

Where an elderly lady married a barrister who had for some time been her confidential friend and adviser, and the lady before marriage insisted that all her personal estate should be settled so as to be "hers as if unmarried" and "hers to give, to use, and to will," and the barrister assented and undertook to prepare a settlement, but no settlement was in fact prepared, and the lady died leaving her husband surviving, it was held in an action by the lady's next of kin, that, as the barrister had undertaken to prepare a settlement, he was bound to prepare such a one as under the circumstances a conveyancer would have drawn or the Court have sanctioned, that such a settlement would have given him no interest in her absolute property in default of appointment by her, and that she having died

without making any disposition in his favour, he was a trustee of her personal estate for her next of kin (a).

In *Skapholme v. Hart* (b), the plaintiff who claimed to be entitled to certain lands applied to a barrister who undertook to recover them, but would not proceed unless the plaintiff gave a bond of £1000 penalty to surrender to the barrister one moiety of the lands when recovered. The barrister drew the bond and tendered it for execution to the plaintiff and persuaded him to execute it. The suit was then proceeded with and the plaintiff recovered the lands. The barrister died, devising the moiety of the lands to the defendant who threatened to put the bond in suit, whereupon the plaintiff filed a bill praying for an order that the bond should be delivered up and the devisee release the moiety devised. Finch, L.C., declared that the bond was unduly obtained and ought to secure no more than what the barrister had actually laid out in recovering the land, and ordered the devisee to convey to the plaintiff all his right to the lands and to deliver up the bond.

It is said in some of the older books to be maintenance for a counsellor to give the client money to maintain his suit (c).

If a client, being under the influence of a counsel, executes a deed in his favour, the deed is liable to be set aside on the ground of undue influence (d); if there is undue influence existing at the time when the deed is executed, it is immaterial whether the relation of counsel and client has ceased or still continues (d).

But where there is no undue influence, a deed executed by a client in favour of his counsel may stand as a voluntary instrument and is not void on grounds of public policy (e). Such a deed is, however, liable to be set aside in favour of creditors of the settlor.

(a) *Campbell v. Corley* (1857), 1 De G. & J. 238.

(b) (1680) Finch, 477.

(c) 2 Roll. Abr. Maintenance, 1 Hawkins, P.C. bk. i. c. 27, s. 28, p. 460.

(d) *Brown v. Kennedy* (1863), 33 Beav. 133; 33 L. J. Ch. 71, 342; 4 De G. J. & S. 217; 10 Jur. N.S. 141; 12 W. R. 360; 9 L. T. N.S. 736.

(e) *Leslie v. Verschoyle* (1815), Beatt. 535.

Where counsel has acted for a client who is party to a suit, and by reason of having so acted becomes aware of some fact that is prejudicial to his client, counsel ought not to accept a brief against his client, even though the client refuses to retain him (*a*).

Counsel ought not to appear for two clients whose interests may conflict (*b*). In the case of a summons to determine whether a sum of money was to be treated as capital or income, the plaintiff being a trustee without any beneficial interest, the defendants another trustee, the tenant for life and the remainderman, counsel stated that he appeared for the neutral trustee and for the tenant for life. Farwell, J., said it was the duty of the trustee's counsel to assist the Court, and that he ought not to argue on behalf of a beneficiary, and adjourned the summons so that the trustee might be separately represented (*c*).

It is slander of a barrister in the way of his profession to say that he is faithless towards his clients, or that he takes fees from both sides, or that he reveals his clients' secrets (*d*), or that he "would give vexatious and ill counsel and stir up a suit, and would milk 'his client's' purse and fill his own large pocket" (*e*).

Confidential communications passing between client, solicitor, and barrister in a professional capacity for the sake of obtaining legal advice, such as cases for opinion of counsel and his opinion thereon, are privileged from disclosure. The Courts will not allow evidence of such communications to be given, and will not order the discovery of such communications as are written; the privilege is not confined to such communications as are made in the course, or in anticipa-

(*a*) *Cholmondeley v. Clinton* (1815), 19 Ves. 274. See Retainer Rules, Annual Practice, 1905, 680; Annual Statement of the General Council of the Bar, 1896-97, 8.

(*b*) See *Day v. Ponsonby* (1842), 5 Ir. Eq. R. 24.

(*c*) *In re Burton, Danby v. Burton* (1901), W. N. 202.

(*d*) *Peare's Case* (1635), Roll. Abr. 55; *Broke's Case* (1595), Sir F. Moore, 409; *Snag v. Gray* (1571), 1 Roll. Abridg. 57.

(*e*) *King v. Lake* (1672), 2 Ventr. 28.

tion, of litigation, but extends to all professional communications of a confidential character made for the purpose of seeking or giving legal advice (*a*). But the communications must be professional; an opinion given by a barrister as a friend is not privileged from disclosure (*b*), and the communications must be of a confidential character (*c*), and made at a time when the relation of counsel and client existed (*d*). The privilege does not extend to communications made for the sake of committing a fraud or a crime (*e*). Counsel's endorsement on his brief of an order of the Court is *publici juris*, and is not a confidential communication (*f*). Pleadings are also *publici juris*, but drafts of pleadings and observations, notes and marks made by counsel on his brief are privileged (*g*). The fact of the retainer of counsel is not privileged (*h*). The privilege is the privilege of the client and not of the professional adviser, and unless waived by the client never ceases at any period of

(*a*) Taylor on Evidence, 9th ed., 591; *Waldron v. Ward* (1654), Styl. 449; *Reece v. Trye* (1846), 9 Beav. 316; *Penruddock v. Hammond* (1847), 11 Beav. 59; *Holmes v. Baddeley* (1844), 1 Phil. 476; 14 L. J. Ch. 113; *Pearse v. Pearse* (1846), 1 De G. & Sm. 12; *Bolton v. Corporation of Liverpool* (1833), 1 Myl. & K. 88; *Nias v. Northern & Eastern Railway Co.* (1838), 3 Myl. & Cr. 355; *Clagett v. Phillips* (1842), 2 Y. & C. Ch. 82; *Combe v. Corporation of London* (1842) 1 Y. & C. Ch. 631; *Jenkyns v. Bushby* (1866), L. R. 2 Eq. 547; *Knight v. Waterford* (1836), 2 Y. & C. Exch. 30; *Mostyn v. West Mostyn Coal & Iron Co.* (1876), 34 L. T. 531; *Pearce v. Foster* (1885), 15 Q. B. D. 114; *Minet v. Morgan* (1873), L. R. 8 Ch. 361; *Carey v. Cuthbert* (1872), 6 Ir. R. Eq. 599; *Bray on Discovery*, 368; *Manual of Military Law*, published by the War Office, 1899, ch. vi. s. 101.

(*b*) See *Smith v. Daniell* (1874), L. R. 18 Eq. 649; *Wilson v. Rastall* (1792), 4 T. R. 753.

(*c*) *Gardner v. Irvin* (1878), 4 Exch. D. 49; *Underwood v. Sec. of State for India*, 35 L. J. Ch. 545.

(*d*) See *Cuts v. Pickering* (1673), 1 Ventr. 197.

(*e*) *Reg. v. Cox* (1884), 14 Q. B. D. 153; *Williams v. Quebrada Railway, Land & Copper Co.* (1895), 2 Ch. 751; *Rothwell v. King* (1673-74), 2 Swanst. 221n.; *Spencer v. Luttrell* (1674), *ib.*; *Stanhope v. Nott*, *ib.*

(*f*) *Nicholl v. Jones* (1865), 2 H. & M. 588; 13 W. R. 451; *re Brown*, *Tyas v. Brown*, 42 L. T. 501; 28 W. R. 575; *Plumley v. Horrell*, W. N. 1868, 240.

(*g*) *Walsham v. Stainton* (1863), 2 H. & M. 1; 12 W. R. 199; *Calcraft v. Guest* (1898), 1 Q. B. 759.

(*h*) *Forshaw v. Lewis* (1855), 1 Jur. N.S. 263.

time (a). But secondary evidence may be given of documents so privileged (b).

But, while communications made between counsel and client for the sake of obtaining legal assistance are privileged from discovery, and while counsel cannot divulge information which has been confidentially imparted to him by his client, yet counsel is not precluded from giving information as to what he has seen in court while present as counsel; for instance, if counsel sees a document in the course of a trial produced by the opposite party, he may be called upon, although he cannot, it seems, be compelled to state what was the condition of the document when he saw it. In *Brown v. Foster* (c), which was an action for false imprisonment, the question arose at what time the plaintiff, who had been accused of embezzlement, made an entry in a book of the defendants, namely, whether before or after the first of two examinations before the magistrates; during the trial of the action for false imprisonment there was in court a barrister who had appeared for the plaintiff at both examinations, but neither party proposed to call him as a witness. Jervis, C.J., who presided at the trial, at the end of the defendant's case said, after consulting with Creswell, J., that he understood there was in court a gentleman who could give important evidence, if he was willing to do so; the barrister stating that he was willing to give evidence, was sworn and examined by the defendant's counsel, and gave evidence that at the first examination before the magistrates the book in question was produced by the prosecution and was seen by him and that he believed it did not then contain the entry; the jury thereupon found for the defendant. A motion was made for a new trial on the ground (*inter alia*) of the improper reception of the evidence of the barrister relating to a matter which had come to his knowledge or

(a) *Per Buller, J., Wilson v. Rastall* (1792), 4 T. R., at p. 759; *Calcraft v. Guest* (1898), 1 Q. B. 759.

(b) *Calcraft v. Guest*, *u.s.*

(c) (1857), 1 H. & N. 736; 26 L. J. Exch. 249.

under his notice in the course of his professional employment as counsel for one of the parties to the suit, but the rule was discharged and the Court held that the evidence was admissible. Pollock, C.B., said, "what the counsel stated was the result of his own observations, and not anything derived from his client." Martin, B., said, "the witness was not called to prove anything he had heard from the plaintiff, but was asked whether on a certain occasion he saw a book, and, having seen it, whether at that time he saw a particular entry in it. What has that to do with a confidential communication? I agree that what passes between counsel and client is not admissible, but what the former sees in court with his own eyes is not within the rule. *Perhaps it would have been better not to have examined the witness*, but I think it is legal evidence, and, being given, was undoubtedly entitled to great weight." Watson, B., said, "if counsel or attorney sees a document in the course of the trial produced by the opposite party, there is no reason why he may not be called on to state the condition of such document at the time."

It is in the option of counsel whether he should or should not give evidence as to what he has said in court as counsel. It seems that such evidence ought properly to be given by some other person. In *Curry v. Walter* (a) which was an action of libel brought against the proprietor of the *Times* newspaper in respect of the publication of an account of an application to the Court of King's Bench for an information against the plaintiff for misconduct as a magistrate, Mr. Erskine, the counsel for the applicant, was subpoenaed to prove that the application had been made and that he had in fact stated in court what the newspaper had reported him to have stated. "Upon Mr. Erskine's coming into Court, Eyre, C.J., said he was of opinion that a barrister should not be called as a witness to prove such a circumstance, but that the party should prove it by other means; but that it should be at the option of the counsel whether he would give his testimony or not. Mr. Erskine

(a) (1796) 1 Esp. 457.

said he would not volunteer the giving of evidence on such an occasion and retired.”

In proceedings before a Committee of the House of Lords to inquire into certain alleged abuses at Greenwich Hospital, Mr. Charles Butler and Mr. Arthur Murphy were called to give evidence; each objected that he knew nothing about the subject except as counsel, the one for Lord Sandwich, the other for Captain Baillie; but as both Lord Sandwich and Captain Baillie desired that the evidence should be given, Mr. Butler and Mr. Murphy gave evidence as to negotiations which they had carried on for the settlement of disputes between Lord Sandwich and Captain Baillie (*a*).

If counsel is called as a witness by his client (*b*), he cannot, it seems, refuse to give evidence.

In several recent cases counsel have at the request of their clients made statements in court as to the circumstances in which they have consented to a compromise of an action. In such cases they generally make the statement from their places at the bar and without being sworn (*c*).

3. *Authority of Counsel*.—When counsel appears in Court and states that he is instructed, the Court will not inquire as to his authority to appear. In the Irish case of *Murphy v. Richardson* (*d*) the defendant had changed his attorney, but the rule for the change had not been served on the other side, and the former attorney’s name appeared on the record; on counsel instructed by the new attorney appearing at the trial, the plaintiff’s counsel objected that, as counsel was not instructed by the attorney on the record, there was no

(*a*) *Baillie’s Case* (1778), 21 St. Tr. 340.

(*b*) See *Guinea’s Case* (1841), Ir. Circ. R. 167.

(*c*) *Hickman v. Berens* (1895), 2 Ch. 638; *Kempshall v. Holland* (1895), 14 R. 336; in *Wilding v. Sanderson* (1897), 2 Ch., at p. 539, the statements were made on oath. See *Iggulden v. Terson* (1833), 2 Dowl. 277.

(*d*) (1850) 13 Ir. L. R. 430. See *Doe d. Bennett v. Hale* (1850), 15 Q. B. 171.

appearance by the defendant. The judge refused to hear defendant's counsel, and directed the case to be heard as undefended, but the Court of Exchequer held that he was wrong in so doing and ordered a new trial.

Where on the hearing of a petition two counsel appeared for the same parties, differently instructed by different solicitors, Plumer, M.R., directed that the petition should stand over and that the authorities under which the solicitors acted should be verified by affidavit (*a*). In another case where two different counsel appeared for the same client, Knight-Bruce, V.C., asked the client who was in court whom he wished to have as his counsel. The counsel whom the client named was heard, and the other counsel excluded (*b*).

The mere giving of a retainer to counsel confers no authority upon him. A brief must be delivered to him in order to authorise him to take any step in an action (*c*).

Counsel cannot share the conduct of a case with his client; if counsel is instructed, he ought to be at the head of the case and conduct it throughout (*d*). It is not becoming for counsel to submit to any limitation of the ordinary authority of counsel in this respect or to take a subordinate position in the conduct of a case (*e*). If a litigant conducts his case in person and examines and cross-examines witnesses, counsel will not be allowed to suggest questions and argue points of law (*f*); if counsel examines and cross-examines witnesses, the litigant will not be allowed

(*a*) *Butterworth v. Clapham* (1820), 1 Jac. & W. 673n. As to solicitors without authority instructing counsel, to appear for parties, see *in re Collins* (1855), 7 De G. M. & G. 558. As to different counsel appearing for the prosecution in criminal matters, see Stone's Justice's Manual, 36th ed. 15n.

(*b*) *In re London & Manchester Direct Independent Railway Co.* (1849), 18 L. J. Ch. 245.

(*c*) *Ahitbol v. Benedetto* (1810), 3 Taunt. 225; 2 Campb. 487: *Doe d. Drake, v. Brown* (1832), 5 C. & P. 315.

(*d*) Alderson, B., in *Moscatti v. Lawson* (1835), 1 Moo. & Rob., at p. 454.

(*e*) *Strauss v. Francis* (1860), L. R. 1 Q. B. 381, 383.

(*f*) *Moscatti v. Lawson* (1835), 1 Moo. & Rob. 454.

to address the Court (a). On one occasion (b), Lord Ellenborough, C.J., allowed counsel to suggest questions for the defendant who was being tried for a misdemeanour and to argue points of law for him, but would not assent to counsel examining witnesses and to the defendant afterwards putting questions to them and addressing the jury. If a litigant instructs counsel to appear for him, the litigant cannot be heard unless he revokes his counsel's authority and himself assumes the conduct of the case (c). A litigant cannot revoke the authority of his counsel for the purpose of assuming the conduct of the case at any time he pleases; he can only do so before the Court and his counsel are fairly seised of the case (d). In *Reg. v. Maybury* (d) the defendant had been indicted for a nuisance and was found guilty; on the prosecution moving for judgment, counsel appeared for the defendant and put in a number of affidavits in mitigation of punishment, but before he had finished reading them he informed the Court that he wished, with the sanction of the Court, to withdraw from the case, as his client, who was present, desired to be heard himself; as the arguments had not been gone into, the Court allowed this to be done, and when the reading of the affidavits was finished, the defendant himself addressed the Court.

The same rule applies if the litigant is himself a barrister; a barrister who is a litigant cannot appear both as counsel and as litigant; he must elect either to conduct the case entirely as litigant in person or to abandon the case entirely to his counsel; he cannot be heard to address the Court either after or before his counsel (e). If one of two

(a) *Shuttleworth v. Nicholson* (1835), 1 Moo. & Rob. 254; *Rex v. Parkins* (1824), Ry. & Moo. 166; *Rex v. White* (1811), 3 Campb. 98.

(b) *Rex v. White* (1811), 3 Campb. 98.

(c) *Parkinson v. Hanbury* (1867), L. R. 2 H. L. 6; 4 De G. M. & G. 508. See *Reg. v. Maybury* (1865), 11 L. T. N.S. 566.

(d) *Reg. v. Maybury* (1865), 11 L. T. N.S. 566.

(e) *New Brunswick & Canada Railway Co. v. Conybeare* (1862), 9 H. L. C. 711; *Newton v. Chaplin* (1849), 19 L. J. C. P. 374. It is doubtful whether a barrister litigant who is conducting his own case has any right to appear in forensic costume or to speak from the places reserved for counsel, see Cox-Sinclair's Rights, etc., of an Advocate, p. 28, cf. *Rex v. Atkins*, 9 Mod. 4.

plaintiffs is a barrister and appears in person and the other plaintiff appear by counsel, the Court will only hear either the barrister litigant or his co-plaintiff's counsel; it will not hear both, but a barrister, though a litigant in person, has been allowed to appear as counsel if properly instructed for himself and another (a).

In a case in the House of Lords where the appellant, owing to the absence of counsel, opened her case herself, the House of Lords intimated that in the exceptional circumstances of the case they would hear the appellant's counsel in reply, but that they would not allow the appellant to begin her reply and break off and be followed by her counsel, but that if she began she must finish (b).

Extent of Counsel's Authority.—Counsel who is briefed to appear for a client at the trial of an action is invested with a general control over the conduct of his client's case. This authority does not arise by virtue of any contract between counsel and client and is not governed by the ordinary rules relating to principal and agent, for counsel is not the agent of the client (c), but is peculiar to and flows from the position which counsel occupies. The authority may be expressly limited by the client, but only to a certain extent, and it is not becoming for counsel to accept a brief with an authority limited to an extent beyond what is usual (d).

With regard to appeals on points of law, if counsel has satisfied himself that he has no argument to offer in support of his case, he ought at once to say so and withdraw altogether; counsel is master of the argument and of the case in court and should at once retire if he finds it wholly unsustainable, unless he has express instructions to the contrary (e).

(a) *Where there is no express limitation.*—The authority

(a) *Newton v. Ricketts* (1848), 2 Phil. 624; 12 Jur. 107, 238.

(b) *Longworth or Yelverton v. Yelverton* (1867), L.R. 1 Sc. & D. 218.

(c) *Colledge v. Horn* (1823), 3 Bingh., at p. 121.

(d) See *Strauss v. Francis* (1860), L. R. 1 Q. B. 381, 383.

(e) *Earl Beauchamp v. Madresfield* (1872), L. R. 8 C. P., at p. 253, *per* Brett, J.

of counsel at the trial of an action extends to the action and all matters incidental to it and to the conduct of the trial (*a*), such as withdrawing the record or a juror (*b*), calling no witnesses, selecting such as in his discretion he thinks ought to be called (*b*), consenting to a reference (*c*), or a *stet processus* (*d*), or a verdict (*e*), undertaking not to appeal (*f*), or on the hearing of a motion for a new trial consenting to the reduction of damages (*g*). A judgment obtained by consent of counsel acting in court (*h*) in a matter within their authority cannot form the subject of an appeal (*i*). For a matter which is within the ordinary authority of counsel the consent of the client is not needed, and if a compromise is entered into by counsel in the absence of the client, the client is bound. Thus in *Matthews v. Munster* (*j*), during the trial of an action for malicious prosecution the defendant's counsel in his client's absence and without any express authority consented to a verdict for £350 with costs and to a withdrawal of all imputations against the plaintiff. A motion by the defendant for a new trial was refused both by the Divisional Court and the Court of Appeal, the Court of Appeal holding that the settlement was within the apparent general authority of counsel and was binding on his client.

If counsel with his client's authority and consent agrees

(*a*) *Per* Pollock, C.B., *Swinfen v. Lord Chelmsford* (1860), 29 L. J. Exch. 382; *Hatch v. Lewis* (1861), 2 F. & F. 467; *Wallace v. Cook*, *Times*, June 15th, 1903.

(*b*) *Chambers v. Mason* (1858), 5 C. B. N.S. 59; 28 L. J. C. P. 10; *Strauss v. Francis* (1866), L. R. 1 Q. B. 379.

(*c*) *Filmer v. Delber* (1811), 3 Taunt. 486; *Faviell v. Eastern Counties Railway Co.* (1848), 2 Exch. 344; *Smith v. Troup* (1849), 7 C. B. 757.

(*d*) *Rumsey v. King* (1876), 33 L. T. N.S. 728.

(*e*) *Matthews v. Munster* (1887), 20 Q. B. D. 141; *Prestwich v. Poley* (1865), 18 C. B. N.S. 806; *Chown v. Parrott* (1863), 32 L. J. C. P. 197.

(*f*) *In re West Devon Great Consols Mine* (1888), 38 Ch. D. 51; but see *Rhodes v. Swithenbank* (1889), 22 Q. B. D. 577.

(*g*) *Thomas v. Harris* (1858), 27 L. J. Exch. 353.

(*h*) Counsel has no authority to compromise an action out of court. *Green v. Crockett* (1865), 34 L. J. Ch. 606.

(*i*) *Downing v. Cage* (1699), 1 Eq. Ca. Abr. 165; *Harrison v. Rumsey* (1752), 2 Ves. Sen. 488; *Bradish v. Gee* (1754), 1 Ken., at p. 76.

(*j*) (1887) 20 Q. B. D. 141.

to an order and there is no mistake or surprise, the client cannot arbitrarily withdraw his consent (a). If terms of compromise are accepted by counsel in the presence of his client, the client cannot afterwards withdraw his consent on the mere allegation that it was inadvertently given (b).

In *Chambers v. Mason* (c), the defendant, his attorney and counsel discussed in conference certain terms of compromise which had previously been offered by the plaintiffs and rejected by the defendant; counsel on leaving the defendant said he would do his best for him, and the defendant expressed no dissent. The action was immediately afterwards settled in court, a juror being withdrawn, the defendant being present and expressing no dissent. An order of Court was drawn up accordingly; the defendant then applied to set aside the order and stated in an affidavit that though present in court he did not understand what was going on. The Court of Common Pleas refused the application on the ground that it would be extremely dangerous to act upon such a statement as the defendant's, the truth of which it would be almost impossible to ascertain.

In *Porter v. Cooper* (d), an indictment for a nuisance was found against the defendant at one quarter sessions, and the defendant not having filed his plea within the proper time, the prosecutor said he should press for judgment unless the defendant would pay the costs of the day. The Court said that the defendant must plead and take his trial, or he might be allowed to traverse on payment of the costs of the day. The defendant's attorney then went and consulted the defendant, who was not in Court; and on the attorney's return an arrangement was concluded and a memorandum drawn up, signed by counsel on both sides in these words—"traversed to next sessions by consent, the defendant paying

(a) *Holt v. Jesse* (1876), 3 Ch. D. 177; *Harvey v. Croydon Union Rural Sanitary Authority* (1884), 26 Ch. D. 249.

(b) *Davis v. Davis* (1880), 13 Ch. D. 861.

(c) (1858) 5 C. B. N.S. 59; 28 L. J. C. P. 10.

(d) (1834) 1 C. M. & R. 387.

the costs of the day." It was held by the Court of Exchequer that what took place at sessions amounted to an agreement between the parties on which the defendant could be sued.

(b) *Where counsel's authority is limited.* — Questions of some nicety have arisen where the authority of counsel has been expressly limited by the client, and counsel have consented to an order or judgment in spite of the dissent of his client, or on terms different from those which the client has authorised (a). If the limitation of authority has been communicated to the other side, a consent by counsel outside the limits of his authority would be of no effect (b). Difficulties have arisen where the authority of counsel is limited, but the limitation is unknown to the other side who enter into a compromise believing that the opponent's counsel has the ordinary authority of counsel.

It has been laid down in some cases that in a matter which is within the ordinary authority of counsel, the Court will not inquire whether there was any limitation of counsel's authority to consent, when the limitation is not communicated to the other side (c). In some cases the Courts have refused to set aside a compromise entered into by counsel when his authority had been limited, but the limitation was not known to the other side.

Thus in *Strauss v. Francis* (d), while counsel for the defendant was addressing the jury, the plaintiff's counsel interposed, and a juror was withdrawn by consent. The plaintiff applied to have the compromise set aside and a new trial granted, on the ground that the withdrawal of a juror was without his assent and against his express wish. The Court of Queen's Bench refused the application, partly because the plaintiff had not established that there was any limitation of counsel's authority, and partly on the ground

(a) See *Scheyer v. Wontner* (1890), 90 L. T. (newsp.), 116.

(b) See *per* Blackburn, J., *Strauss v. Francis* (1866), L. R. 1 Q. B. 382.

(c) *In re Hobler* (1848), 8 Beav. 101; *Mole v. Smith* (1820), 1 Jac. & W. 673; *Chambers v. Mason* (1858), 5 C. B. N.S. 59; 28 L. J. C. P. 10.

(d) (1866), L. R. 1 Q. B. 379.

that it is not enough in such a case to show that counsel's authority was limited, but that it must also be shown that the limitation was known to the other side.

In *Rumsey v. King* (a), counsel and solicitor for the plaintiff consented to a *stet processus*; the compromise was announced in open court; the plaintiff was present and expressed his dissent to his counsel and solicitor, but did not protest openly in court. The Court refused to set aside the *stet processus*, holding that the plaintiff, if he had wished not to be bound by his counsel's consent, should have protested openly in court. If in such a case the client were to insist on his counsel going on, the proper course for counsel to take would be, it seems, to return his brief (b).

In the case of *Lynch v. Cowell* (c), counsel for the plaintiff consented to a non-suit, the plaintiff's attorney's clerk objecting, the plaintiff being in court but not interfering. A motion for a new trial, on the ground that the consent was made without authority, was refused. Crompton, J., said that it was the duty of counsel to do the best he could in his judgment for his client, and that the Court would not interfere unless counsel exercised a clearly wrong discretion.

In *Filmer v. Delber* (d), the counsel and attorney of the defendant agreed to refer the action, and an order of Court was made accordingly. The defendant then applied to have the order set aside on the ground that she had expressly desired her counsel not to consent to any rule of reference, but her application was refused (e).

In *Wright v. Soresby* (f), a verdict by consent was taken in the presence of the defendant in court against his express instructions to his counsel. The defendant did not communicate his dissent to the other side or to the Court; an application

(a) (1876) 33 L. T. N.S. 728.

(b) *Per* Blackburn, J., *Strauss v. Francis* (1866), L. R. 1 Q. B. 382.

(c) (1865) 12 L. T. N.S. 548.

(d) (1811) 3 Taunt. 486.

(e) But see *Neale v. Gordon-Lennox* (1902), A. C. 465.

(f) (1834) 2 C. & M. 671.

for a new trial was refused on the ground that the defendant had allowed the arrangement to be concluded.

The cases of *Filmer v. Delber* (a), *Rumsey v. King* (b), *Strauss v. Francis* (c), *Matthews v. Munster* (d), with many others bearing on the authority of counsel (e), were cited in argument in the House of Lords in *Neale v. Gordon-Lennox* (f), but Lord Halsbury, L.C., in giving his judgment in that case, while approving of these cases, said they all turned on the discretion of the Court, and that none of them decided that the Court had no power to set aside an order which had been agreed to by counsel whose authority was limited, even although the limitation was not known to the other side. In *Neale v. Gordon-Lennox* (f), the plaintiff in an action for libel had agreed to her counsel referring the action on the condition that all imputations on her character were withdrawn in open court. Her counsel agreed to an order of reference without making any stipulation as to the withdrawal of the imputations. After the order was drawn up the plaintiff applied to Lord Alverstone, C.J., before whom the case had been called on, that the order of reference should be set aside. Lord Alverstone set the order aside on the ground that the order was interlocutory, and that where an interlocutory order was made by consent without authority, it might be set aside. Lord Alverstone intimated that had the order been a final one, he would have held that the order could not have been set aside, because the limitation of counsel's authority was not known to the other party. The Court of Appeal reversed the decision of Lord Alverstone, C.J., and held that the same principle applied

(a) (1811) 3 Taunt. 486.

(b) (1876) 33 L. T. N.S. 728.

(c) (1866) L. R. 1 Q. B. 379.

(d) (1887) 20 Q. B. D. 141.

(e) *Swinfen v. Swinfen* (1857), 1 C. B. N.S. 364; *Kempshall v. Holland* (1895), 14 R. 336; *Prestwich v. Poley* (1865), 18 C. B. N.S. 806; *Fray v. Voules* (1859), 1 E. & E. 839; *Smith v. Troup* (1849), 7 C. B. 757; *Furnival v. Bogle* (1827), 4 Russ. 142; *Faviell v. Eastern Counties Railway Co.* (1848) 2 Exch. 344.

(f) (1902) A. C. 465.

to the compromise of an action resulting in an interlocutory order as to a compromise resulting in a final order. The House of Lords reversed the decision of the Court of Appeal, and, without overruling any of the cases quoted, decided that the Court had power to interfere, that it was not prevented by the agreement of counsel from setting aside the order, that it was a matter of discretion for the Court, and that in the particular circumstances of the case, as grave injustice would be done by refusing to allow the plaintiff to have her case tried in open court, if the imputations on her character were not withdrawn, the order ought to be set aside. This case establishes that where an order is made by consent of counsel, whose authority is limited, the order may be set aside, although the opposite party is ignorant of the limitation, and that it is a matter of discretion (*a*) for the Court whether the order should or should not be set aside. The principle of the decision seems applicable to many of the proceedings by which the validity of a compromise may be tested, such as a summons or motion in the action (*b*), or an action for specific performance of the compromise (*c*), or a motion for a new trial or an appeal, when such a procedure is applicable; but it is not clear that it applies to the bringing of an action on the agreement, or of a fresh action to set aside a final judgment obtained by consent (*d*), for in these two last-mentioned cases it would seem that no question as to the discretion of the Court can arise.

(*c*) *Collateral matters*.—The authority of counsel to compromise an action is limited to the issues in the action. A compromise made by counsel affecting collateral matters will not bind the client unless he expressly assents (*e*).

(*a*) See *Lynch v. Cowell* (1865), 12 L. T. N.S. 548.

(*b*) See *Eden v. Naish* (1878), 7 Ch. D. 781; *Alliance Pure White Lead Syndicate v. MacIvor's Patents* (1891), 7 Times L. R. 599.

(*c*) Per Lord Halsbury, L.C., *Neale v. Gordon-Lennox*, at p. 469.

(*d*) See *Emeris v. Woodward* (1889), 43 Ch. D. 185.

(*e*) *Swinfen v. Swinfen* (1857), 1 C. B. N.S. 364; 26 L. J. C. P. 97; *Swinfen v. Lord Chelmsford* (1860), 29 L. J. Exch. 382; *Ellender v. Wood* (1888), 32 Sol. Jo. 628; *Kempshall v. Holland* (1895), 14 R. 336; *Thomas v. Hewes* (1834), 2 C. & M. 519.

The law relating to this subject was much discussed in a series of cases which arose out of the suit of *Swinfen v. Swinfen* (a). In that suit an issue had been directed by the Master of the Rolls, to try the validity of a will by which an estate was devised to the plaintiff, Mrs. Swinfen. The trial of the issue came on at Stafford Assizes. After the close of the first day the plaintiff's counsel suggested a compromise to her but she refused to agree; subsequently the plaintiff's counsel, in the presence of her solicitor but in the absence of the plaintiff herself, and without any express authority from her, agreed to a compromise on the terms, that a juror should be withdrawn, the estate should be conveyed by the plaintiff to the defendant in fee free of incumbrances created since the death of the testator and that the defendant should secure to the plaintiff an annuity. These terms were embodied in an order of *nisi prius* which was made a rule of court. On the plaintiff not complying with the terms of the order, two applications were made to the Court of Common Pleas to attach the plaintiff for contempt. The first application failed on the ground that no demand and refusal of performance had been proved (b); the second application also failed, as Crowder, J., held that the compromise was outside the implied general authority of counsel, and as the majority of the Court, though of a different opinion, would not make the rule absolute for an attachment, when one member of the Court differed (c). The defendant then filed a supplemental bill in Chancery, praying for the specific performance of the agreement to compromise, or in the alternative for a new trial of the issue (d). Romilly, M.R., refused to grant specific performance, and ordered a new trial, holding that the agreement was not binding on the plaintiff, that her counsel had

(a) 18 C. B. 485; 25 L. J. C. P. 303; 1 C. B. N.S. 364; 26 L. J. C. P. 97; 24 Beav. 549; 27 L. J. Ch. 35, 491.

(b) (1856) 18 C. B. 485; 25 L. J. C. P. 303.

(c) (1857) 1 C. B. N.S. 364; 26 L. J. C. P. 97.

(d) *Swinfen v. Swinfen* (1857), 24 Beav. 549; 27 L. J. Ch. 35.

no authority to enter into the compromise without express instructions from the client, and that the plaintiff had not bound herself by acquiescence; this judgment was affirmed on appeal by Knight-Bruce and Turner, L.JJ., on the ground that there had been no consent by the plaintiff (a).

The case of *Swinfen v. Swinfen* was distinguished in *Prestwich v. Poley* (b), Erle, C.J., saying that "it can hardly be referred to as a decision which is to afford a guide in any case not similarly circumstanced." It was also distinguished in *Thomas v. Harris* (c) and *Strauss v. Francis* (d). Indeed it can now only be treated as an authority for the proposition that a compromise by counsel relating to a matter collateral to an action cannot bind the client without his express assent (e).

The principle that the authority of counsel to compromise an action does not extend to matters collateral to the action is illustrated by the cases of *Ellender v. Wood* (f) and *Kempshall v. Holland* (g). In *Ellender v. Wood*, which was an action for breach of promise of marriage, the plaintiff's counsel agreed to settle the action and all claims by the plaintiff against the defendant for £100 and costs, and an order was made staying proceedings in accordance with the compromise; the claims to which the compromise extended arose under a deed by which the defendant in consideration of the plaintiff agreeing not to molest or annoy him covenanted to pay her a weekly sum during her life; the breach of this agreement had been set up by the defendant in his counterclaim in the action. The

(a) 27 L. J. Ch. 491; 6 W. R. 480. Knight-Bruce, L.J., also referred to the special nature of the proceedings and to the circumstances that a verdict either for or against Mrs. Swinfen would not have been of any avail unless confirmed by the Court that directed the issue.

(b) (1865) 18 C. B. N.S., at p. 814.

(c) (1858) 27 L. J. Exch. 353.

(d) (1866) L. R. 1 Q. B. 379.

(e) See *per* Pollock, C.B., *Swinfen v. Lord Chelmsford* (1860), 29 L. J. Exch. 382.

(f) (1888) 32 Sol. Jo. 628.

(g) (1895) 14 R. 336.

defendant, after having received the £100 and costs, began a fresh action for damages for breach of promise of marriage and for payment of the sums due under the agreement. The Divisional Court stayed proceedings in the second action on the ground of the compromise. On the plaintiff appealing from this decision and also from the order by consent staying proceedings in the first action, the Court of Appeal refused to set aside the order in the first action, but varied the order staying proceedings in the second action by excluding from the operation of the order so much of the items of the plaintiff's claim under the agreement as did not come within the first action but with which the compromise affected to deal.

In *Kempshall v. Holland* (a), which was also an action for breach of promise of marriage, the plaintiff's counsel consented to verdict and judgment being entered for the defendant without costs on the terms that the plaintiff and her solicitor should hand over to the defendant all letters and copies of letters from the defendant in their possession, that the plaintiff should undertake not to molest the defendant, and that the defendant should pay the plaintiff £1000 and her solicitor £200. The plaintiff applied for a new trial on the ground that she had never consented to the arrangement, and that the agreement as to the giving up of the letters and the undertaking not to molest, related to matters collateral to the issue, and was not within the ordinary authority of counsel. The Court of Appeal granted a new trial holding that the plaintiff's counsel had authority without the express consent of the plaintiff to agree that judgment should be entered for the defendant, but had no authority without express consent to agree to the return of the letters and to undertake not to molest the defendant, these matters being outside the scope of the action.

The case of *Elworthy v. Bird* (b), which was an instance

(a) (1895) 14 R. 336.

(b) (1824) 13 Price, 222; (1829) Tam. 38.

of a compromise affecting collateral matters, is remarkable for the different views taken by the Court of Chancery, and by the Courts of common law.

In that case an indictment was found against the defendant at quarter sessions for an assault on his wife. The justices recommended an arrangement, and an agreement was come to by counsel that a nominal fine should be imposed on the defendant, and that a deed of separation should be executed, and an annuity secured by him to his wife. The substance of the agreement was stated to the justices, and sanctioned by them, and they, in consequence of it, sentenced defendant to a nominal fine, and ordered the trials of other indictments against the defendant for assaults on his wife to be respited. The defendant's solicitor agreed to the arrangement, and the defendant himself was present in court, and did not dissent. On the defendant failing to carry out the terms of the agreement, an action was brought on it by the persons who were to be the trustees of the separation deed. At the trial of the action before Best, J., the briefs of counsel with the agreement indorsed and signed by the counsel for the defendant, were produced by the plaintiff's attorney who stated that he understood that the parties assented to it. The defendant's attorney was called, and stated that he had recommended the defendant to adopt the agreement, but that the defendant would not. Best, J., therefore non-suited the plaintiffs, holding that there was nothing to leave to the jury in support of the action on the agreement. The non-suit was upheld by the Court of Exchequer, Hullock, B., holding that there was no evidence of the defendant's assent, and that the plaintiffs were bound to prove this. Garrow, B., expressed no opinion on this point, but held that the plaintiff's counsel in the court below had tacitly acquiesced in the non-suit (*a*). Another action was then brought by the plaintiffs, and was tried before Mr. Sergeant Bosanquet

(a) (1824) 13 Price, 222.

and the plaintiffs were again non-suited on the ground that while they alleged that the bills of indictment had been wholly discontinued and not further proceeded with, there was no evidence that the prosecutors had taken any steps to put an end to the indictments. The non-suit was upheld by the Court of Common Pleas, Best, J., expressing a doubt whether the agreement was a legal one (a). The plaintiffs afterwards brought a bill in chancery praying for specific performance of the agreement. An objection was first raised that a compromise of an indictment for assault could not be the ground of an action, but this objection was over-ruled (b). Leach, M.R., in trying the main question took a different view from the common law judges, whose decision, however, does not seem to have been cited to him, and held that, as the agreement was signed by counsel, it was for the defendant to prove that he had not assented. After hearing the evidence he decided that the defendant's counsel had authority to bind his client, and that, although the defendant objected when the arrangement was first proposed, he afterwards assented. A decree was accordingly made for the specific performance of the agreement (c).

(d) *Mistake*.—A compromise by counsel will not bind the client if counsel is not apprised of facts the knowledge of which is essential in reference to the question on which he has to exercise his direction. Thus in *Furnival v. Bogle* (d) the defendant's counsel at the trial proposed certain terms, and the plaintiff's counsel asked for time as the solicitor instructing him was not in court. The defendant's counsel refused to grant any time, and the plaintiff's counsel thereupon accepted the proposed terms in the absence of both plaintiff and his solicitor, and an order by consent was made in the presence of the clerk to the plaintiff's solicitor. The plaintiff immediately gave notice of motion

(a) 9 Moore, 430; 2 Bingh. 258.

(b) (1825) 2 Sim. & Stu. 372.

(c) (1829) Taml. 38.

(d) (1827) 4 Russ. 142.

that the order by consent should not be drawn up. It appeared that an offer of terms similar to those accepted had been made to the plaintiff at an earlier stage of the proceedings, and had been rejected, that the offer had been renewed and no answer given. These circumstances were not known to the plaintiff's counsel when he accepted the proposed terms. Lyndhurst, L.C., granted the plaintiff's application on his paying the costs of the consent order, and the proceedings to which it had given rise.

Where counsel enters into a compromise in intended pursuance of terms agreed upon between the clients, and the compromise, owing to a misunderstanding, fails to carry out the intentions of one side, the compromise does not bind the client, and the Court will allow the consent to be withdrawn (*a*).

Where counsel acting upon instructions to compromise consent to a compromise under a misunderstanding, and the compromise does not carry into effect the intention of counsel, and is thought by one party to be more extensive than the other party intends it to be, in such a case there is no agreement on the subject-matter of the compromise, and the Court will set the compromise aside (*b*). But a person who has consented to a compromise will not be allowed to withdraw his consent because he subsequently discovers that he had a good ground of defence (*c*).

Generally speaking an order or judgment made by consent may be set aside upon any ground which would invalidate an agreement between the parties (*d*).

(*e*) *Infants, etc.*—A compromise or order made by consent of counsel for an infant or other person under disability is

(*a*) *Lewis's v. Lewis* (1890), 45 Ch. D. 281.

(*b*) *Hickman v. Berens* (1895), 2 Ch. 638. See *Wilding v. Sanderson* (1897), 2 Ch. 534.

(*c*) *Elsas v. Williams* (1884), 52 L. T. 39.

(*d*) *Huddersfield Banking Co. v. Lister* (1895), 2 Ch. 273; *Wilding v. Sanderson* (1897), 2 Ch. 534. See *Turner v. Green* (1895), 2 Ch. 205; *Windhill Local Board v. Vint* (1890), 45 Ch. D. 351; *Attorney-General v. Tomline*, (1877), 7 Ch. D. 388.

not binding on the client (a) unless it is sanctioned by the Court as being for the benefit of the client (b). A compromise entered into by counsel for a person under disability and counsel for a person not under disability cannot be enforced by an action for specific performance, even at the instance of the infant, there being no mutuality or reciprocity in the compromise (c).

In *Cumming v. Ince* (d), the plaintiff had been confined in a lunatic asylum, and an inquisition, under a commission of lunacy, was held upon her, and attended by her counsel and by counsel for the promoters; before any verdict was given an arrangement was signed by counsel on both sides that the plaintiff should be released from confinement, that certain arrangements should be made as to her property, and that some title deeds, which had been taken from her when she was put under restraint and which were in the hands of the promoters of the commission, should be given up and placed in the hands of the defendant, and that the commission should be superseded. The plaintiff was accordingly released, and the deeds handed over to the defendant. The plaintiff then brought an action of detinue against the defendant to recover the deeds. On the trial of the issue whether the plaintiff was entitled to the possession of the deeds, Erle, J., left to the jury but one question—viz. whether the consent of the plaintiff's counsel to the agreement was obtained by constraint. The jury found that it was so obtained. A motion for a new trial was refused by the Court of Queen's Bench, who held that the question was rightly left to the jury, and that the legality of the restraint (assuming it to be legal) and the consent of counsel furnished no conclusive proof that the agreement was not void by

(a) *Rhodes v. Swithenbank* (1889), 22 Q. B. D. 577; *Turner v. Turner* (1852), 2 De G. M. & G. 28; *Biddell v. Dowse* (1827), 6 B. & C. 255; *Rossborough v. Boyse* (1854), 3 Ir. Ch. R. 540; but see *Knipe v. McMahon* (1843), 4 Dr. & War. 295; *Mole v. Smith* (1820), 1 Jac. & W. 673.

(b) See Annual Practice 1905, II. 348.

(c) *Hargrave v. Hargrave* (1850), 12 Beav. 408; 19 L. J. Ch. 261.

(d) (1847) 11 Q. B. 112.

duress, and that if counsel acted for the plaintiff, believing her to be of sound mind, and being influenced by the same fear of the results of restraint which affected the mind of the plaintiff, the action of counsel ought to be considered as enforced by the same duress as the action of the plaintiff.

(f) *Statements by counsel when evidence against client.*—

On the trial of an action, or in the course of any interlocutory proceeding relating to the action, the statements of counsel, at all events if made in the presence of the client or solicitor or some one authorised to represent the solicitor (a), and if not repudiated, bind the client, and may be used as evidence against him at any stage in the same proceedings.

In *Colledge v. Horn* (b), the defendant sought at the trial to prove an admission made in the presence of the plaintiff by his counsel in his opening address to the jury on a former trial, but Alexander, C.B., rejected the evidence. The Court of Common Pleas directed a new trial in order that the facts might be ascertained, Best, J., observing, “at present it does not appear whether the plaintiff was within hearing of the statement made by his counsel or how far that statement was authorized.” Burroughs, J., said, “parties are every day bound by the Acts and declaration of their counsel. If the plaintiff was in court, heard what his counsel said, and made no objection, I think he was bound.”

In *Duncombe v. Daniell* (c), an action of libel relating to a cheque, the plaintiff's counsel, in his opening speech, said that his client had paid the cheque, but no evidence was adduced as to this fact. Denman, C.J., held that the defendant's counsel was entitled to call for the production of the cheque on a notice to produce without proving it to be in the plaintiff's possession in any other way than by reference to his counsel's opening, and that on the cheque not being produced, secondary evidence of its contents might be given.

(a) See *Mahony v. Mahony* (1850), 2 Ir. Jur. 129.

(b) (1825) 3 Bingh. 119.

(c) (1837) 8 C. & P. 222.

But in *Machell v. Ellis* (a), an action of trover for a colt, where the plaintiff's counsel stated in his opening that the defendant had distrained the colt, on the defendant attempting to rely on the opening as evidence of the distress, Pollock, C.B., refused to consider the fact of the distress as established by the plaintiff's opening.

In *Haller v. Worman* (b), an action of detinue to recover papers, the defendant's counsel, at the hearing in judge's chambers of a summons to change the venue, stated in the presence of the clerk to the solicitor who was instructing him that his client had the papers. Evidence of this statement was admitted by the judge at the trial of the action, and the jury found a verdict for the plaintiff. A motion for a new trial on the ground that the evidence ought not to have been received, was refused by the Court of Common Pleas, who held that the admission by the defendant's counsel was rightly received in evidence as a statement made by counsel in the discharge of his duties relevant to the matter in issue, and made for the purpose of influencing the judge to take a step in favour of his client. Williams, J., said that when counsel before a Court or a judge makes a statement or does an act in the presence of the attorney on the record or of any authorised person who represents the attorney, and the statement or the act is not repudiated by the attorney or his representative, this amounts to an adoption of it, and it becomes the statement or act of the attorney and therefore of the party (c).

When in the conduct of a case by counsel, a particular fact is, without being formally admitted, treated by both sides as admitted, the jury have a right to draw the same conclusion, as if the fact had been proved or admitted (d).

A special case signed by counsel is as against the parties

(a) (1845) 1 C. & K. 682.

(b) (1861) 3 L. T. N.S. 741; 2 F. & F. 165.

(c) See *The Ship Clifton* (1835), 3 Knapp. 375; *Mahony v. Mahony* (1850), 2 Ir. Jur. 129.

(d) *Stracy v. Blake* (1836), 1 M. & W. 168; *Bolton v. Sherman* (1837), 2 M. & W., at p. 403.

for whom counsel act an admission of the facts therein stated, and may be used in subsequent proceedings as evidence of such facts (a).

A statement made by counsel out of court does not bind the client. In *Richardson v. Peto* (b), the defendant's counsel obtained a rule *nisi*, calling upon the plaintiff to show cause why judgment should not be entered for the defendant. After service of the rule *nisi* the plaintiff's attorney met the defendant's counsel in the street, told him the plaintiff was unwell and unable to give the necessary instructions for showing cause against the rule, and asked the defendant's counsel to postpone bringing on the motion to make the rule absolute. The defendant's counsel promised to do so, and said there was no hurry, but advised the attorney to be as quick as he could. The rule was afterwards made absolute, no one appearing to show cause against it, and judgment was then signed. A motion was then made to set aside the judgment, on the ground that the rule had been made absolute at an earlier period than according to good faith and the understanding between the parties ought to have been done. The Court of Common Pleas refused to set aside the judgment, Tindal, C.J., observing that "the attorney admitted to prosecute or defend represents his client throughout the cause, but a counsel represents his client only when speaking for him in court. It would confuse the relative position of the two branches of the profession, if we were to hold that a communication made to counsel by the adverse attorney or party, or a statement made by him out of court was to have the same effect as a communication made to a proceeding from the attorney."

4. *Authority of counsel in non-litigious matters.*—In non-litigious matters the acts of counsel can only bind the client when counsel has express authority or when his acts are adopted by the client. The legal effect of such acts has

(a) *Van Wart v. Wolley* (1823), Ry. & Moo. 4. See *Edmunds v. Newman* (1823), Ry. & Moo. 5n.

(b) (1840) 1 M. & G. 896; 9 Dowl. P. C. 73

rarely formed the subject matter of judicial decisions. The effect of the approval by counsel of a title to property has been considered in several cases (a). In *Deverell v. Bolton* (b), which was an action for specific performance of a contract to purchase a house, the plaintiff's title had been conditionally approved by the defendant's counsel, but additional requisitions were made in consequence of counsel's opinion, and ultimately the defendant's counsel insisted on conditions which the plaintiff would not satisfy. It was contended that the conditional approval amounted to a waiver of objections, but Lord Eldon, L.C., refused to grant specific performance, observing that "it is too much to say that, when an abstract is laid before counsel who approves the title, his approbation is to be taken as against the person consulting him as a waiver of all reasonable objections." But, if counsel for a purchaser waive the production of a particular document stated in the abstract to be lost, and the purchaser adopt the opinion of counsel and continue to deal with the vendor, the purchaser will not be permitted afterwards to repudiate the opinion of his counsel (c).

A purchaser (d) is not prejudicially affected by notice of any instrument, fact, or thing which has come to the knowledge of his counsel as such, unless it came to the knowledge of counsel in the same transaction with respect to which a question of notice to the purchaser arises (e).

5. *Effect of acting under counsel's advice.*—The question whether counsel's opinion protects the client who acts on it has been raised in several cases. The client can derive no

(a) *Deverell v. Lord Bolton* (1812), 18 Ves. 505; *McCulloch v. Gregory* (1855), 1 K. & J. 292; *Alexander v. Crosby* (1844), 1 Jo. & Lat. 666; 7 Ir. Eq. R. 448.

(b) (1812) 18 Ves. 505.

(c) *Alexander v. Crosby* (1844), 1 Jo. & Lat. 666; 7 Ir. Eq. R. 448.

(d) The term "purchaser" in this sense includes a lessee or mortgagee or an intending purchaser, lessee, or mortgagee, or other person who for valuable consideration takes or deals for property (Conveyancing Act, 1882, s. 1 (4) (ii)).

(e) Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 3.

protection from counsel's opinion, unless the facts have been properly stated to counsel and his advice obtained *bonâ fide* and properly pursued (a). If criminal proceedings are instituted by a person who lays all the facts of the case before counsel and acts *bonâ fide* upon the opinion given, this is in an action for malicious prosecution evidence of reasonable and probable cause for the prosecution (b). But if the client does not act *bonâ fide* on the opinion or lays an incorrect statement of facts before counsel, the opinion of counsel will be of no avail to the defendant in such an action (c). The opinion of counsel recommending a purchaser not to accept a title or to accept it only under certain conditions will not protect the purchaser from costs if the Court should be of opinion that a good title can be made (d).

Where property is sold by order of the Court and the conveyancing counsel to the Court settles the conditions of sale, the conveyancing counsel is the counsel of the vendor, and for any error made by such counsel the vendor is liable (e).

Questions have frequently arisen to what extent trustees are protected if they act on the advice of counsel. If trustees acting under the advice of counsel make a wrong payment, they will none the less be ordered to return the money if they are sued by their *cestui que trust* (f). Parties who act in a manner which the Court decides to be improper, cannot protect themselves by showing that they received bad advice, however eminent the person may be who gave

(a) *Andrews v. Hawley* (1857), 26 L. J. Exch. 323.

(b) *Ravenga v. Mackintosh* (1824), 2 B. & C. 693; *Abrath v. N. E. Railway Co.* (1883), 11 Q. B. D., at p. 455, *per* Lord Esher, M.R.

(c) *Hewlett v. Cruchley* (1813), 5 Taunt. 277; *Ravenga v. Mackintosh* (1824), 2 B. & C. 697.

(d) *Maling v. Hill* (1785), 1 Cox, 186; *Osborne to Rowlett* (1880), 13 Ch. D., at p. 798.

(e) *In re Banister, Broad v. Munton* (1879), 12 Ch. D. 131.

(f) *In re Jackson, Wilson v. Donald* (1881), 44 L. T. 467; *Boulton v. Beard* (1853), 3 De G. M. & G. 608.

it (a). Because an action is advised by counsel, it does not follow that it is always and necessarily one which trustees may properly bring (b). According to Lord Selborne, L.C., "the advice of counsel is not an absolute indemnity to trustees in bringing an action, though it may go a long way towards it" (b). But in some cases where trustees have acted under the advice of counsel, and have consequently been sued by their *cestuis que trustent* and have been unsuccessful, the Court has exercised its discretion and refused to make the trustees pay the costs of the proceedings. Thus, where the owner of a bare legal estate refused to convey it except under certain conditions, and it was held that he was not justified in his refusal, still, as he had acted *bonâ fide* under the advice of a conveyancer of character, the Court, while it made a decree against him, did not order him to pay costs to the other side (c). So, when trustees acting under the advice of counsel refused to pay money over to the *cestuis que trustent*, and raised questions as to their title, and an action was brought and decided against the trustees, yet no costs were given against them (d). In another case (e), Jessel, M.R., refused to make the trustees of a settlement pay the plaintiff's costs of an action that was brought against the trustees, and was made necessary by the conduct of the trustees who, acting under the advice of counsel, had put a mistaken interpretation on a clause in the settlement.

In another case (f) when the *cestuis que trustent* called upon their trustees to transfer a certain fund, and the trustees took the advice of counsel, who recommended that the transfer might be made subject to certain conditions to which the *cestuis que trustent* were willing to agree, but the trustees still refused to transfer, and a bill was filed against the trustees, Stuart, V.C., while directing a transfer, gave

(a) *Peers v. Ceeley* (1892), 15 Beav. 209, per Romilly, M.R.

(b) *Stott v. Milne* (1884), 25 Ch. D., at p. 714.

(c) *Angier v. Stannard* (1834), 3 Myl. & K. 566.

(d) *Devey v. Thornton* (1851), 9 Hare, 232.

(e) *Ryan v. Nesbitt* (1879), W. N. 100.

(f) *King v. King* (1857), 1 De G. & J. 663.

the trustees their costs. On appeal it was argued by the plaintiffs that they had consented to all the requisitions on which counsel had insisted, and that, therefore, the trustees were not entitled to the costs of an action brought to compel them to do what their counsel had advised they might do on certain conditions to which the plaintiffs had agreed. Turner, L.J., however, thought that the trustees were justified in asking the opinion of the Court, and that the advice of counsel fell short of what was required. Knight-Bruce, L.J., dissented, but the judgment of Stuart, V.C., was affirmed.

In another instance (a), trustees acting on the opinion of counsel based upon a case instead of paying a trust fund over to their *cestuis que trustent* paid it into court. On a petition being brought, asking that the fund should be transferred to the *cestuis que trustent*, and that the trustees should be ordered to pay the costs, Jessel, M.R., after deciding that the case on which counsel had relied did not justify his advice, said that as the point was not free from doubt to other minds, although he was quite clear about it, and as it was the first case of the kind that had come before him, he would not make the trustees pay the costs, but that if any trustees acted in a similar manner, in the future he would make them pay the costs.

In another case (b), trustees who, acting under the advice of counsel, paid a trust fund into court without being justified were ordered to pay the costs incurred by the *cestuis que trustent* in obtaining payment out of court.

In another case where a trustee acting under the advice of counsel refused to transfer the trust fund as the *cestuis que trustent* required, and an action was brought against him to compel him to transfer, the Court ordered him to transfer the fund and also to pay the plaintiffs' costs as well as his own (c).

(a) *In re Cull's Trusts* (1875), L. R. 20 Eq. 561.

(b) *In re Knight's Trusts* (1859), 27 Beav. 49.

(c) *Firmin v. Pulham* (1848), 12 Jur. 410.

If a trustee, without the sanction of the Court, commences an action or defends an action unsuccessfully, he does so at his own risk as regards costs, even if he acts on counsel's opinion; and when the trustee seeks to obtain such costs out of his trust estate, he ought not to be allowed to charge them against the estate unless under very exceptional circumstances (*a*).

In a case where an executor, without taking legal advice, paid to a creditor of his testator in consequence of what purported to be a legal decision in Switzerland a larger sum than was due, Lord Alvanley in holding the executor liable for the over payment said, "if he had taken advice and been advised by any gentleman of the law in this country, that he was bound to make this payment, I would not have held him liable" (*b*).

(*a*) *Per* Lindley, L.J., in *re Beddoe, Downes v. Cottam* (1893), 1 Ch., at p. 557.

(*b*) *Vez v. Emery* (1799), 5 Ves. 141.

CHAPTER VII.

PRECEDENCE—KING'S COUNSEL AND JUNIOR
BARRISTERS.

IN the Supreme Court of Judicature, and in other Courts where barristers alone can practise, there are certain fixed rules governing the precedence or preaudience of counsel. The Attorney-General and the Solicitor-General (*a*) have precedence of all other barristers (*b*). After them come the King's Counsel, and those to whom patents of precedence have been granted by the Crown (*c*). These rank *inter se* according to the dates of their patents; with the King's Counsel rank the Queen Consort's Attorney-General and Solicitor-General (*d*); then come the junior barristers whose precedence *inter se* is determined by the date of their call; if two counsel are called to the bar on the same day at different Inns of Court, the one whose name has been longest on the book of the Inn to which he belongs is the senior (*e*). Those who have obtained studentships or certificates of honour rank in seniority over all other students called on the same day. Those who have obtained

(*a*) See 6 Taunt. 424.

(*b*) Except, perhaps, in the Palatine Court of the Duchy of Lancaster. See *Attorney-General v. Lord Advocate*, 2 Cl. & F. 487n.

(*c*) See *Attorney-General for Canada v. Attorney-General for Ontario* (1898), A. C. 247; Blackstone, iii. 28; Manning's *Serviens ad Legem*, 25; Foss's *Judges*, viii. 91.

(*d*) Blackstone, iii. 28n., where a table of precedence is given, including eleven degrees, only four of which now exist, viz. Attorney-General, Solicitor-General, King's Counsel, Barrister.

(*e*) Case of *Abbott and Peake*, 6 C. & P. 637n.

certificates of honour rank immediately after the holder of a studentship called on the same day (a).

In the House of Lords, where Scotch and Irish counsel are heard as well as English, the Attorney-General and the Solicitor-General have precedence (b). The Attorney-General takes precedence of the Lord Advocate, even in a Scotch case (c). The precedence of colonial King's Counsel and law officers in the Privy Council is not well defined. At one time, it is said, it was the practice for English King's Counsel to lead in all cases (d), but Sir H. James, when Attorney-General, gave an opinion that colonial King's Counsel, when pleading in the Privy Council in colonial cases, should have the same precedence afforded to them as if they were King's Counsel created in England, and that there was no objection to an English King's Counsel accepting a junior brief to a Canadian King's Counsel, especially as the Canadian counsel was Attorney-General for Ontario (e).

According to a long-standing rule of the profession, a King's Counsel cannot hold a brief for the plaintiff on the hearing of a civil cause in the High Court, Court of Appeal, or the House of Lords without a junior. It is the usual practice for King's Counsel to insist upon having a junior when appearing for a defendant in like cases, and also when appearing either for the prosecution or for the defence in trials of criminal indictments (f). It is unusual that a King's Counsel should appear without a junior in the Privy Council or in the County Court (g). It is not usual for a King's Counsel to appear in judge's chambers (h). A

(a) Consolidated Regulations of the Four Inns (April, 1903), s. 58; Annual Statement of the General Council of the Bar, 1902-03, 11.

(b) See 19 L. J. (newsp.) (1884), 596.

(c) *Attorney-General v. Lord Advocate* (1834), 2 Cl. & F. 481.

(d) 19 L. J. (newsp.) (1884), 596.

(e) *Ib.*

(f) Seventh Annual Statement of the Bar Committee (1890), 2; Annual Statement of the General Council of the Bar, 1901-02, 5. See *Cooke v. Turner* (1844), 12 Sim. 649.

(g) Annual Statement of the General Council of the Bar, 1902-03, 3.

(h) *Dickson v. Harrison* (1878), 9 Ch. D., at p. 246.

King's Counsel does not usually appear at Quarter Sessions (a) without a special fee. A King's Counsel cannot appear in a case against the Crown, even if the Crown be only a nominal party, without a licence from the Crown (b). On being called within the bar, a King's Counsel gives up that part of a barrister's practice which consists of drafting and writing opinions on evidence, but may settle any such drafting and advice on evidence in consultation with a junior (c). In the Chancery Division, the rule is, that a King's Counsel should not settle pleadings even in cases in which he has been engaged before taking silk, except in consultation with a junior (d). There is no uniform practice in the King's Bench Division which prohibits a junior who has taken silk from settling pleadings and doing the other ordinary work of a junior, after he becomes a King's Counsel, in cases in which he was retained as a junior. "It is in the discretion of a junior who has taken silk to refuse to do this work, and this course is often followed" (e). In the Chancery Division, the usual practice is that on taking silk a King's Counsel should attach himself to a particular court, and should not accept a brief in any other court in that Division without a special fee (f). But a King's Counsel in either the King's Bench or the Chancery Division can attend in any court without a special fee in any case in which he has been engaged as junior (g).

By long-settled practice the fees on the briefs of the

(a) Dickinson's Quarter Sessions (5th ed.), p. 135.

(b) See *Reg. v. Jones* (1840), 9 C. & P. 404; *Reg. v. Bartlett* (1846), 2 C. & K. 321; *Attorney-General for Canada v. Attorney-General for Ontario* (1898), A. C. 247; Crown Office Rules, App. E, No. ccxxxix., Short and Mellor's Crown Office Practice, 713. A fee of 10s. 6d. is payable to counsel's clerk on the licence being obtained, see Eleventh Annual Statement of the Bar Committee, 6.

(c) Annual Statement of the General Council of the Bar, 1901-02, 5.

(d) *Ib.*, 1900-01, 11.

(e) *Ib.*

(f) *Ib.*, 1898-99, 11.

(g) *Ib.*, 1900-01, 11.

leading counsel and his junior respectively stand to one another in the proportion of three to two or five to three, but there is no rigid rule on the subject. A junior is entitled to refuse a brief which is not marked in this proportion, but there is no rigid rule of professional etiquette which prevents him from accepting a brief marked with a fee bearing a less proportion to his leader's fee, but it is in accordance with the practice of the profession that he should refuse to do so in the absence of special circumstances affecting the particular case, and he should be supported by his leader in such action (*a*).

A junior barrister may accept a brief to take notes or to open the pleadings, and in such a case the rule as to the proportion of fees between leader and junior does not apply, but the junior so briefed cannot take any part in the trial except doing that for which he has been briefed (*b*).

On the trial of an action the leader has the conduct of the case, and the Court will not allow the junior counsel to take up a line different from that taken up by his leader (*c*).

(*a*) Annual Statement of the General Council of the Bar, 1900-01, 5.

(*b*) *Ib.*, 1903-04, 13.

(*c*) See *Pickering v. Dowson* (1813), 4 Taunt. 779.

CHAPTER VIII.

THE HEARING OF COUNSEL.

1. AT the trial of a civil action in the King's Bench Division by a judge with a jury, the first step in the proceedings taken by counsel (*a*) is the opening of the pleadings by the junior counsel for the plaintiff; to open the pleadings is to state concisely what are the issues of fact on the record; no one but a stuff-gownsmen can open the pleadings, and except on the trial of an action brought *in formâ pauperis* (*b*), if a King's Counsel appear for the plaintiff, a stuff-gownsmen must also be instructed on the same side at least to open the proceedings (*c*). After the pleadings have been opened, the question sometimes arises on which side is the *onus* of proof, and therefore the right or the obligation to begin (*d*). If there is any argument on this point, one counsel only on each side is heard (*e*).

Opening speech.—When no question arises as to the right to begin or when it arises and has been decided, the leading counsel for the party that begins opens his case. Counsel

(*a*) As to the absence of counsel, see *Anon.* (1697), 2 Salk. 645; *Sanders v. McConnell*, *Times*, February 12th, 1885; *Times*, May 5th, 1886; *Anon.*, 78 L. T. (newsp.), 286; *Cockle v. Joyce* (1877), 47 L. J. Ch. 543; *Stokes v. Kromshoder* (1879), W. N. 196; *Fass v. Gunter*, *Times*, October 27th, 1886; Chitty's Archbold's Practice, 737.

(*b*) *James v. Harris* (1835), 7 C. & P. 257.

(*c*) *McAskie v. McCay* (1868), 2 Ir. R. Eq. 447. See Annual General Statement of the General Council of the Bar, 1902-03, 3.

(*d*) See Best on Evidence, s. 637; Day's Common Law Procedure Acts, 4th ed., 260.

(*e*) *Rawlins v. Desborough* (1837), 2 M. & Rob. 70; *Bastard v. Smith* (1837), 2 M. & Rob. 132.

in opening states the facts and circumstances of the case to the jury, the substance of the evidence he has to adduce, and its effect in proving the case, and remarks upon any point of law upon which, together with the matters of fact, the jury will have to find their verdict (*a*). The object of an opening is to give the jury a general notion of what will be given in evidence so as to enable them to understand the evidence when it is given (*b*). It is improper for counsel to give to the jury or the Court his own personal opinion of the case (*c*). In the opening, or in any address to the jury, counsel may state those facts of which the Court takes judicial notice (*d*). It is irregular to open facts which require proof, but which it is not intended to prove, or to open any matters irrelevant to the issues to be tried; the statement of such matters in an opening, while it may be prevented by the judge, cannot in strictness be objected to by the other side at that stage, and the proper time to object to the introduction of irrelevant matter is when it is tendered in evidence (*e*). But it is by no means uncommon for counsel to object to the introduction of irrelevant matter in an opening or other speech. In some cases the opposite party may make use of an opening in support of their own case (*f*). Usually it is left to the discretion of counsel to determine what facts he shall open to the jury, but the introduction of irrelevant matter which influences the minds of the jury, is ground for granting a new trial (*g*). If the jury is misled by the

(*a*) Chitty's Archbold's Practice, 14th ed., 630; *Smart v. Rayner* (1834), 6 C. & P. 722. See *Stevens v. Webb* (1835), 7 C. & P. 61; *Reg. v. Beard* (1837), 8 C. & P. 142; *Duncombe v. Daniell* (1837), 8 C. & P. 227.

(*b*) *Per* Pollock, C.B., *Machell v. Ellis* (1845), 1 C. & K., at p. 684.

(*c*) *Per* Cockburn, C.J., *Ryves v. Attorney-General*, Annual Register, 1866, Remarkable Trials, 255; Lord Herschell, *The Rights and Duties of an Advocate*, 10.

(*d*) Taylor on Evidence, Pt. I. chap. ii.; *Darby v. Ouseley* (1856), 1 H. & N. 1; 25 L. J. Exch. 227; *Howard v. Gossett* (1842), Car. & Marsh. 380.

(*e*) See *Low v. Holmes* (1858), 8 Ir. Ch. R. 53.

(*f*) See *Duncombe v. Daniell* (1837), 8 C. & P. 227.

(*g*) *Wallace v. Cook*, *Times*, June 15th, 1903.

speeches of counsel, introducing at any stage facts which are immaterial or not proved, this is ground for a new trial (*a*).

It is irregular for the plaintiff's counsel either in his opening or at any stage of the trial before verdict to mention the amount of general damages claimed by the plaintiff (*b*); neither the fact that money has been paid into Court by the defendant, nor the amount paid in, can be communicated to the jury (*c*).

Judgment cannot be given against a litigant on the opening of his counsel alone before any evidence is heard, unless his counsel consents (*d*).

Examination in chief.—When the opening is finished, the evidence is gone into, and the witnesses, if there are any, are orally examined “in chief”; if more counsel than one are engaged on the same side, they generally divide between them the examination of the witnesses. It is the duty of the junior counsel on each side, when not engaged in examining witnesses, to take a note of the evidence, and such a note may be used on appeal to supplement the notes of the judge (*e*). If a junior counsel has begun to examine a witness, his leader may interpose and take the witness out of his hands and finish the examination, but when one counsel has closed his examination, no other counsel on the same side can regularly put any other question “in chief” (*f*).

Cross-examination.—When the examination-in-chief of a witness is finished, counsel on the other side may cross-examine him. Cross-examination serves not only to test the evidence of witnesses and to elicit evidence from the opposite side, but also to indicate the nature of the case which counsel, who is cross-examining, intends to set

(*a*) *Praed v. Graham*, 24 Q. B. D. 53.

(*b*) Annual Statement of the General Council of the Bar, 1898-99, p. 12.

(*c*) R. S. C. O. xxii. r. 22.

(*d*) *Fletcher v. L. & N. W. Ry. Co.* (1892), 1 Q. B. 122.

(*e*) *Earl de la Warr v. Miles* (1881), 19 Ch. D. 80.

(*f*) *Doe v. Roe*, 2 Campb. 280.

up(a). Omission to cross-examine as to facts deposed to by a witness in chief makes it unnecessary to call any further evidence with regard to such facts.

Re-examination.—When the cross-examination of a witness is finished, the counsel for the party, on whose behalf the witness is called, may re-examine him as to matters arising out of the cross-examination.

If a witness objects to answer a question(b), or to produce a document(c), the witness cannot have counsel to argue for him; nor can counsel for one of the parties object in favour of a witness that an answer to a particular question may render him liable to prosecution; such an objection belongs to and must be made by the witness alone(d). Indeed, witnesses who are not parties have no right to be represented by counsel on the trial of an action(e).

If a point of law is raised during the examination of a witness or at any other stage of a trial, all the counsel on each side may be heard, but in practice it is not usual for more than two counsel on each side to argue(f); the leading counsel present for the side on which the point is raised has a right of reply(g); if in replying he cites cases that have not been cited before, one counsel on the opposite side is allowed to observe on these cases(h). On questions of fact the Court only hears one counsel on each side(i).

It is not usual for counsel to take “stamp objections,” that is, to object to the admissibility of a document in evidence on the ground that it is unstamped or insufficiently stamped, unless such defect goes to the validity of the

(a) *Wharton v. Lewis* (1824), 1 C. & P. 529.

(b) *R. v. Adey* (1831), 1 M. & Rob. 94.

(c) *Doe d. Rowcliffe v. Egremont* (1841), 2 M. & Rob. 386.

(d) *Thomas v. Newton* (1827), 1 M. & M. 48n.; *Hebblethwaite v. Hebblethwaite* (1869), L. R. 2 P. & D. 29.

(e) As to witnesses in bankruptcy, etc., see *post*, p. 109.

(f) *Daniell's Ch. Pr.*, 7th ed., 596.

(g) See *Arden v. Tucker* (1832), 1 M. & Rob. 192.

(h) *Fairlie v. Denton* (1828), 3 C. & P. 103.

(i) See *Conington v. Gilliat* (1876), 1 Ch. D. 694.

document, or to take part in the discussion in support of such an objection, unless incited to do so by the Court (*a*).

A litigant appearing in person is allowed both to address the Court and to give evidence on his own behalf, but it is doubtful whether a person who appears as advocate for another can give evidence as a witness (*b*).

When all the witnesses for the party who begins have been called, his counsel intimates that his case is closed; counsel on the other side may then submit that there is no case to go to the jury. If the judge expresses an intention to decide in favour of such a submission, counsel for the party who begins must, if it is wished afterwards to complain of misdirection, insist on the case being left to the jury. If the judge says that he will non-suit on a point of law, counsel does not by mere acquiescence in the judge's ruling lose the right to move for a new trial (*c*). Where a defendant raised objections to the plaintiff's case, and the judge held the objection to be good, and the plaintiff's counsel acquiesced in the judge's ruling, and a verdict passed for the defendant without his counsel going into his case, the Court, on an application for a new trial, "inclined to think the objection good but refused, after the points had been abandoned by the plaintiff's counsel at the trial, and the defendant thereby precluded from going into his case, to permit them to be mooted" (*d*).

When the counsel for the party who begins has closed his case and the counsel for the other side does not announce his intention to adduce evidence, the counsel for the party who begins has the right to address the jury a second time for the purpose of summing up his evidence (*e*); but there

(*a*) Annual Statement of the General Council of the Bar, 1901-02, 5.

(*b*) *Stones v. Byron* (1846), 4 Dowl. & L. 393; *Deane v. Packwood* (1847), *ib.*, 395n.; but see *Eastland v. Burchell*, 3 Q. B. D., at p. 436; *Guinea's Case* (1841), *Ir. Circ. R.* 167.

(*c*) *Hughes v. G. W. Ry. Co.* (1854), 14 C. B. 637; but see *Elworthy v. Bird* (1824), 13 Price, 222.

(*d*) *Robinson v. Cook* (1815), 6 Taunt. 336.

(*e*) R. S. C. 1883, O. xxxvi. r. 36; Day's Common Law Procedure Acts, 4th ed., 259.

is no such right when the judge holds that there is no evidence to go to the jury (*a*). Counsel for the party who does not begin will not be allowed to try to elicit from the jury an expression of opinion whether or not they desire him to call evidence (*b*). If the party who does not begin does not announce his intention to adduce evidence and the counsel on the other side has summed up his evidence, the counsel for the party who does not begin cannot alter his mind and adduce evidence (*c*). If counsel for the party who does not begin calls no evidence, he has the last word and counsel on the other side has no right of reply, except where the sovereign is a party to the record, in which case the Attorney-General or the Solicitor-General by virtue of his office can claim a right to reply (*d*).

The calling of witnesses to prove some collateral issue does not give a right of reply to the party who begins (*e*).

If counsel for the party who does not begin cites a case but calls no witnesses, the counsel for the party who begins has a right to observe on the case cited (*f*).

If counsel for the party who does not begin opens facts to the jury and calls no witnesses to prove these facts, the judge may allow a reply to the counsel on the other side (*g*).

When counsel for the party who does not begin announces his intention to call witnesses, then on the close of his opponent's case he opens his own case and comments on the evidence that has been given (*h*) and indicates the

(*a*) *Hodges v. Ancrum* (1855), 11 Exch. 214; 24 L. J. Exch. 257.

(*b*) *Moriarty v. Brooks* (1834), 6 C. & P. 684.

(*c*) *Ib.*

(*d*) *Taylor*, s. 390; *Best*, s. 631; *Chitty's Archbold Pr.*, i. 645; see *Rowe v. Brenton* (1825), 3 M. & Ry. 304.

(*e*) *Harvey v. Mitchell* (1840), 2 Moo. & Rob. 366.

(*f*) *Power v. Barham* (1835), 7 C. & P. 356.

(*g*) *Crerar v. Sodo* (1827), 1 M. & M. 85; see *Rex v. Bignold* (1823), 1 D. & Ry. N. P. C. 59; *Naish v. Brown* (1846), 2 C. & K., 219; *Darby v. Ouseley* (1856), 1 H. & N. 1; 25 L. J. Exch. 227.

(*h*) See *Glennie v. Glennie* (1863), 3 S. & T. at p. 110; 32 L. J. P. & M. at p. 21.

nature of his case and the evidence which he proposes to adduce; he then calls his witnesses, and after they have been examined, cross-examined, and re-examined, he sums up his own evidence (*a*). It often happens that counsel for the party who does not begin instead of making an opening speech calls his witnesses immediately after the close of his opponent's case and makes one general speech at the close of his own evidence; however, in strictness the comments on the case of the other side ought to be made in the opening speech, and the speech at the close of the evidence ought to be limited to the summing up of the evidence (*b*).

When the counsel for the party who does not begin has summed up his evidence, the counsel on the other side replies generally on the whole case. If the counsel for the party who does not begin opens a defence on the facts and also relies upon a legal objection, and after citing cases in support of his objection calls witnesses to establish the facts, he is entitled to a reply on the matter of law after the general reply of the counsel on the other side (*c*).

Co-plaintiffs must appear by the same solicitor and the same counsel and cannot sever (*d*).

Co-defendants may be represented by different solicitors and counsel, and, if they are so represented, it is a matter for the discretion of the judge at the trial to decide how many counsel shall be heard (*e*). When the interests of the co-defendants are precisely the same, the court will not allow more than one cross-examination of the plaintiff's witnesses or more than one address to the jury on behalf of the

(*a*) See *Gilford v. Davies* (1860), 2 F. & F. 23.

(*b*) See *Gilford v. Davies* (1860), 2 F. & F. 23; Day's Common Law Procedure Acts, 4th ed., 259n.

(*c*) *Arden v. Tucker* (1832), 1 Moo. & Rob. 192.

(*d*) *Ballard v. White* (1843), 2 Hare 158; *Wedderburn v. Wedderburn* (1853), 17 Beav. 158. *In re Norwood's Patents* (1895), 12 Rep. Pat. Cas. 219, 221. Cordery on Solicitors, 3rd ed. 108; *Newton v. Ricketts* (1848), 2 Phill. 624; 12 Jur. 107, 238; *Swift v. Grazebrook* (1842), 13 Sim. 185.

(*e*) *Nicholson v. Brooke* (1848), 2 Exch. 213.

defendants (*a*). The defendants' witnesses in such a case will be examined by the different counsel in the same manner as if the defence were joint and not separate (*b*); but different counsel will be heard for each defendant on a legal objection (*c*). In one case two defendants had pleaded by one attorney; an application was made to the judge in chambers to allow them to sever in their pleading, but was refused on the ground that the only object of the application was to have two speeches; at the trial counsel appeared for one defendant, but the other defendant appeared in person; Tindal, C.J., refused to allow two speeches for the defendants to be made to the jury; the defendant who appeared in person was allowed to cross-examine the plaintiff's witnesses but not to address the jury; the only speech to the jury that was allowed for the defendants was made by the counsel who appeared for one (*d*).

When several defendants appear by different solicitors and different counsel and have different interests, counsel for each defendant so appearing will be allowed to cross-examine the witnesses on the other side and to address the jury (*e*). In such a case it is in the discretion of the judge to say in what order counsel for the different defendants shall cross-examine and address the jury (*f*); it has sometimes been contended that the order of the seniority of the different counsel is the right one, but the practice generally, though not invariably, followed is that counsel for the different defendants should have priority according to the

(*a*) *Nicholson v. Brooke* (1848), 2 Exch. 213; *Sparkes v. Barrett* (1837), 8 C. & P. 442; *Chippendale v. Masson* (1815), 4 Campb. 174; *Doe d. Hogg v. Tindale* (1829), 3 C. & P. 565; 1 M. & M. 314; *Mason v. Ditchborne* (1835), 1 M. & Rob. 462; *Batty v. McCundie* (1828), 3 C. & P. 204n; *Palmer v. Maclear* (1858), 1 S. & T. 149.

(*b*) *Chippendale v. Masson* (1815), 4 Campb. 174.

(*c*) *Per Tindal, C.J., Poole v. Sidden* (1832), Roscoe, N. P., 17th ed., 290.

(*d*) *Perring v. Tucker* (1829), 4 C. & P. 70; 1 M. & M. 392.

(*e*) *Ridgeway v. Philip* (1834), 3 Dowl. 154; 1 C. M. & R. 417; *King v. Williamson* (1822), 3 Stark. 162, D. & R. N. P. 35; *Massey v. Goyder* (1829), 4 C. & P. 162n; *Child v. Stenning* (1878), 7 Ch. D. 413; 47 L. J. Ch. 371.

(*f*) *Fletcher v. Crosbie* (1842), 2 M. & Rob. 417.

order in which the defendants' names appear on the record (a). If one defendant calls witnesses and another who is separately represented does not, the counsel for the defendant who does not call witnesses can only address the Court once, namely, in general, before the witnesses for the other defendants are examined (b); if the evidence which it is proposed to give on behalf of one defendant is hostile to the interests of the other defendant, the judge may allow counsel for the defendant who does not call witnesses to address the jury not before but after the evidence has been heard on behalf of the other defendant (c). In a case where there were two defendants represented by different counsel, each of whom cross-examined the plaintiff's witnesses, and addressed the jury, and certain witnesses had been subpoenaed by both defendants, only one counsel was allowed to examine these witnesses-in-chief (d). In cases in which co-defendants are more opposed in interest to one another than to the plaintiff, permission may be given to each defendant or to each set of defendants to open and prove their cases separately. An instance of this kind is to be seen in the case of *Phillips v. Willetts* (e), which was an issue to try whether the plaintiff was the next of kin of an intestate; there were two sets of defendants who appeared by separate counsel; one set put forward a case not inconsistent with that of the plaintiff, namely, a pedigree showing that the persons whom they represented stood in the same degree of relationship to the intestate as the plaintiff and that they were entitled to share with the plaintiff; the other set of defendants put forward a case adverse both to the plaintiff and to their co-defendants, and sought to show that they were the next of kin to the exclusion both of the plaintiff and of their co-defendants.

(a) See *Phillips v. Willetts* (1840), 2 M. & Rob. 319; *Wynne v. Wynne*, 2 M. & Rob. 321; *Child v. Stenning* (1878), 7 Ch. D., at p. 414.

(b) See *Glennie v. Glennie* (1862), 3 S. & T. 109; 32 L. J. P. & M. 17. But see *Ryland v. Jackson and Brodie* (1902), 18 Times L. R. 574.

(c) *Beale v. Moults* (1843), 1 C. & K. 1.

(d) *King v. Williamson* (1822), 3 Stark. 162.

(e) (1840) 2 Moo. & Rob. 319.

On the close of the plaintiff's case, Alderson, B., held that counsel for the second set of defendants, whose interest was most opposed to that of the plaintiff, should first open his clients' case and call his witnesses; that these witnesses should be cross-examined first by counsel for the other set of co-defendants, and then by counsel for the plaintiff; that on the close of the case of the second set of defendants, counsel for the other set of co-defendants should open his clients' case and call witnesses, and that these witnesses should be cross-examined first by counsel for the second set of defendants and then by counsel for the plaintiff, and that on the close of the cases of both sets of defendants counsel for the plaintiff should reply generally on both. A similar order was said in the course of this case to have been observed in the earlier case of *Wynne v. Wynne* (a).

On the trial of an issue, counsel for a person who is not a party to the record, but who has liberty to attend the trial, cannot call witnesses or address the jury, but is allowed to cross-examine witnesses and to suggest points of law (b).

Under the present third party procedure, the position for a third party on the trial of the question between the plaintiff and the defendant must depend on the terms of the order (c). In a case when the order was that the question as to the liability of the third party should be tried as soon as might be after the trial of the action, counsel for the third party was allowed to cross-examine witnesses on the trial of the action (d).

After the case for the defence has been closed and the plaintiff's counsel has replied, the judge sums up the evidence to the jury and directs them on points of law. An objection to the applicability of evidence cannot be taken

(a) 2 Moo. & Rob. 321. As to the cross-examination of a co-defendant's witnesses by his co-defendant, see *Allen v. Allen* (1894), P. at p. 254.

(b) *Wright v. Wright* (1830), 7 Bingh. 459.

(c) See R. S. C. (1883), O. xvi., r., 52; *Coles v. Civil Service Supply Association* (1884), 26 Ch. D. 529; *Barton v. L. & N. W. Ry. Co.* (1888), 38 Ch. D. 144.

(d) *Blore v. Ashby* (1889), 42 Ch. D. 682.

after the judge has commenced his summing up (*a*). Objections that have not been taken (*b*), or that have been abandoned (*c*) by counsel, cannot be revived afterwards; but when counsel relies on some grounds of defence only, such a selection does not amount to a waiver of the rest (*d*). Counsel may correct mis-statements of fact by the judge, but not errors of law (*e*). Counsel may ask the judge to put certain specific questions to the jury, but, unless these questions are distinctly raised on the record, the refusal to put them does not amount to mis-direction (*f*). It is the duty of counsel on each side to take a note of the substance of the summing up and of the judgment for the purpose of informing the Court above in case of an appeal (*g*). Counsel indorse on their briefs the effect of the verdict, judgment, or order of the Court, and judgments and orders are often drawn up from such indorsements (*h*), but, if there is any difference in the indorsements on the briefs, any question that arises as to the terms of the order or judgment is settled by a reference to the note of the officer of the court taken at the time (*i*).

2. On the trial of an action by a judge without a jury in the King's Bench Division the pleadings are not formally opened, but in other respects *mutatis mutandis* the proceedings are similar to those in a trial by a judge with a jury.

(*a*) *Abbott v. Parsons* (1831), 7 Bingh. 563.

(*b*) *Henn v. Neck* (1834), 3 Dowl. 163. See *Campbell v. Loader* (1865), 34 L. J. Exch. 50.

(*c*) *Malone v. Geraghty* (1843), 2 Con. & L. 250; 3 Dr. & War. 262.

(*d*) *Galwey v. Barron* (1841), Long. & Town. 76.

(*e*) *Payne v. Ibbotson* (1858), 27 L. J. Exch. 341.

(*f*) *Walton v. Potter* (1841), 3 M. & G. 411. See *Weiser v. Segar*, W. N. (1904), 93; *Seaton v. Bernand* (1900), A. C., at p. 143.

(*g*) See *ex parte Skerratt* (1884), 28 Sol. Jo. 376.

(*h*) In the Chancery Division the party bespeaking a judgment or order has to leave with the registrar his counsel's brief and such other documents as may be required by the registrar for the purpose of enabling him to draw up the judgment or order. R. S. C. O. lxii. r. 4. But the production of the brief may be dispensed with, see O. lxii. r. 12; *Yeatman v. Read* (1863), 14 W. R. 123; *Mayor of Bristol v. Cox* (1886), 30 Sol. Jo. 356.

(*i*) See *per Pearson, J.*, W. N. (1884), 91.

3. On the trial of an action in the Chancery Division the procedure is different. The leading counsel for the party who begins opens his case, the evidence is then gone into, and the junior counsel on the same side sums up the evidence; the leading counsel on the other side then opens his case, and the evidence is gone into, and the junior counsel on that side sums up the evidence; the leading counsel of the party who begins may then reply (*a*). This practice, however, is by no means invariably followed, and in some cases the leading counsel opens and closes his case and examines all the witnesses.

A cause cannot be heard as a "short cause" in the Chancery Division unless there is a certificate by counsel for the plaintiff that the cause is fit to be so heard, *i.e.* that it is one which is not likely to take more than ten minutes (*b*).

4. In the trial of an action in the Probate, Divorce, and Admiralty Division the order of proceedings is in many respects the same as in the King's Bench Division, but there are some variations arising out of the special procedure of the Court (*c*).

In a suit for the dissolution of marriage where the Queen's Proctor intervened and other parties who were separately represented by counsel also intervened and supported the Queen's Proctor's case, the order of proceedings was as follows:—The case was opened and witnesses were called and examined by counsel for the Queen's Proctor; counsel for the other witnesses was allowed to examine these witnesses before they were cross-examined by the petitioner's counsel and to cross-examine the petitioner's witnesses after they had been cross-examined by the Queen's Proctor's counsel, but was not allowed to address the jury (*d*).

(*a*) *Kino v. Rudkin* (1877), 6 Ch. D. 163; *Bonnewell v. Jenkins*, W. N. (1877), 202. But see *Metzler v. Wood* (1877), 47 L. J. Ch. 139.

(*b*) *Daniell's Ch. Pr.*, 7th ed. 583; *Felstead v. Gray* (1874), L. R. 18 Eq. 92; *Walker v. Siggers*, W. N. (1875), 194; *Hargraves v. White* (1853), 17 Jur. 435-6.

(*c*) As to the cross-examination of a respondent on behalf of a co-respondent, see *Allen v. Allen* (1894), P. 248.

(*d*) *Dering v. Dering and Blakeley* (1868), L. R. 1 P. & D. 534.

Where certain plaintiffs propounded a will which was opposed by the testator's next-of-kin and heir-at-law, who both pleaded the same pleas but were separately represented by counsel, counsel for the heir-at-law was allowed to cross-examine the plaintiff's witnesses after they had been cross-examined by counsel for the next-of-kin, and to address the jury after counsel for the next-of-kin had opened his case (*a*).

In proceedings under 20 and 21 Vic. c. 77, s. 26, when a person is brought before the Court to be examined as to his knowledge of the testamentary papers of some one deceased, the person so brought has the right to have counsel attend on his behalf; counsel in such a case may put questions to the witness and cross-examine other persons similarly summoned as witnesses (*b*).

In Admiralty it frequently happens that there are several actions relating to the same matter—*e.g.* the salvage of a ship, and these actions are often consolidated or tried together, and questions then arise as to the hearing of different counsel for the different plaintiffs. When two actions are consolidated, and the interest of one of the plaintiffs is adverse to the interest of the others, separate counsel may be heard on his behalf (*c*). Where different salvage actions are consolidated or tried together, counsel for rival salvors may cross-examine each other's witnesses, but only as to circumstances in dispute between them (*d*). In such cases the counsel for the ship that was first on the spot generally begins (*e*).

5. In examinations under s. 27 of the Bankruptcy Act, 1883 (*f*), if the person summoned is the debtor, he is allowed to have the professional assistance of counsel or solicitor (*g*).

If a witness other than the debtor is summoned, he is

(*a*) *Pocock v. Low* (1868), L. R. 1 P. & D. 535n.

(*b*) *In the goods of Cope*, 36 L. J., P. & M. 83.

(*c*) *The Scout* (1872), L. R. 3 Adm. & Eccl. 512.

(*d*) *The Morocco* (1871), 1 Asp. N.S. 46; 24 L. T. N.S. 598.

(*e*) *The Willem III.* (1871), 1 Asp. N.S. 132.

(*f*) 46 & 47 Vict. c. 52.

(*g*) *In re Greys Brewery Co.* (1883), 25 Ch. D., at p. 405.

entitled to be represented by counsel when the examination is the "first step in a litigation hostile to the witness" (*a*). It seems that the practice is to allow counsel for all witnesses so examined (*b*), but a witness summoned for examination only is not entitled to be paid by the party summoning him the costs of employing solicitor or counsel (*c*).

Where a witness is examined under s. 115 of the Companies Act, 1862 (*d*), he is entitled to be represented by counsel, who may examine the witness when the examination of the registrar is finished, and may take and carry away notes of the proceedings (*e*), but may only use the notes for the purpose of re-examination of the witness (*f*). The examination is a private proceeding, and the registrar may exact as a condition of a person being allowed to be present at the examination an undertaking not to disclose to any one, without the leave of the Court, any information he might acquire at the examination (*g*).

6. In criminal trials the procedure is in many respects different from that which is followed in civil actions. Where no counsel appears for the prisoner, it is not necessary that counsel for the prosecution should make an opening speech to the jury (*h*), except where there is some peculiarity in the circumstances (*i*); where the prisoner is defended, counsel ought always to open the case (*j*), and in the opinion of some judges (*k*) all cases, whether defended or not, should be opened. In opening a case, counsel for the prosecution

(*a*) Williams' Bankruptcy Practice, 8th ed., 96. *Ex parte Kemp*, in re Sir W. Russell (1873), 42 L. J. Bankr., at p. 28; *ex parte Waddell*, in re Lutscher (1877), 6 Ch. D. 328.

(*b*) Williams' Bankruptcy Practice, *l.c.*

(*c*) *Ex parte Waddell*, in re Lutscher, *l.c.*

(*d*) 25 & 26 Vict. c. 89.

(*e*) *In re Breach-loading Armoury Co.* (1867), L. R. 4 Eq. 453. *In re Cambrian Mining Co.* (1881), 20 Ch. D. 376.

(*f*) *In re Cambrian Mining Co.*, *l.c.*

(*g*) *In re London and Northern Bank* (1902), 2 Ch. 73.

(*h*) *Rex v. Jackson* (1837), 7 C. & P. 773.

(*i*) *Rex v. Bowler* (1837), 7 C. & P. 773.

(*j*) *Rex v. Gascoigne* (1837), 7 C. & P. 772.

(*k*) *E.g.* Grantham, J., Oxford Circuit, Worcester Winter Assize, 1895.

"ought to state all that it is proposed to prove, as well declarations of the prisoner as facts, so that the jury may see if there be a discrepancy between the opening statements of counsel and the evidence afterwards adduced in support of them (*a*), unless such declarations should amount to a confession, when it would be improper for counsel to open them to the jury" (*b*), as the circumstances in which the confession was made may render it inadmissible in evidence. "The general effect only of any confession said to have been made by a prisoner ought to be mentioned in the opening address of the prosecuting counsel" (*c*). After the opening speech, the witnesses for the prosecution are examined and cross-examined; if the prisoner gives evidence himself, but calls no other witnesses, he is called immediately after the close of the evidence for the prosecution (*d*); if the prisoner is defended by counsel, but not otherwise, the counsel for the prosecution has the right of addressing the jury a second time for the purpose of summing up the evidence (*e*); this is done after the prisoner has given evidence when he is the only witness for the defence, and after the close of the evidence for the prosecution if he does not give evidence or gives evidence and calls other witnesses. The counsel for the prosecution in so summing up ought not to comment on the fact that witnesses have not been called for the defence, except in cases in which it might fairly be expected that witnesses should be called (*f*), and, indeed, the right of summing up the evidence for the prosecution ought only to be exercised in exceptional cases, and even in such cases with great forbearance (*g*).

(*a*) *Rex v. Hartel* (1837), 7 C. & P. 773; *Rex v. Davis* (1837), 7 C. & P. 785.

(*b*) *Rex v. Swatkins* (1831), 4 C. & P. 548; *Rex v. Davis* (1837), 7 C. & P. 786; *Rex v. Orrell* (1837), 7 C. & P., at p. 775, *per* Bolland, B. Archbold's Criminal Pleading Evidence and Practice, 22nd ed. 187.

(*c*) Archbold's Criminal Pleading, 187.

(*d*) 61 & 62 Vict. c. 36, s. 2.

(*e*) 28 & 29 Vict. c. 18, s. 2.

(*f*) *Reg. v. Rudland* (1865), 4 F. & F. 496; *Reg. v. Puddick* (1865), *ib.* 497.

(*g*) See *Reg. v. Holchester* (1866), 10 Cox. 226 (*sub. nom.* *Reg. v. Berens*), 4 F. & F. 842; *Reg. v. Webb* (1865), 4 F. & F. 862.

When more prisoners than one are jointly indicted and tried together and defended by different counsel, counsel for each prisoner may cross-examine the witnesses for the prosecution and address the jury. The proper order in which the different counsel for the prisoners should cross-examine witnesses and address the jury, is the order in which the prisoners are named in the indictment (*a*). When one of several prisoners calls witnesses to facts and the others do not, the counsel for the prisoners who do not call witnesses cannot in general postpone their addresses to the jury until after the evidence for the other prisoners has been given (*b*); but this course was allowed in one case (*c*). If no witnesses other than the prisoner are called for the defence, the counsel for the prisoner has the last word, unless the Attorney-General or Solicitor-General is conducting the prosecution, in which case either of these officers has, by virtue of his office, a right of reply (*d*). If the prisoner instead of giving evidence himself on oath, makes a statement to the jury, this statement cannot be made by counsel, but must be made by the prisoner himself after his counsel has addressed the jury, if he is defended. The statement gives to counsel for the prosecution the right of reply (*e*).

When two prisoners are jointly indicted and only one of them is defended by counsel and the prisoner who is undefended wishes to make a statement, it seems to be in the discretion of the judge to determine whether the prisoner

(*a*) *Reg. v. Barber* (1844), 1 C. & K. at p. 438; *Reg. v. Balfour*, *Times*, Oct. 29th, 1895, p. 4.

(*b*) *Reg. v. Barber* (1844), 1 C. & K. 434.

(*c*) *Reg. v. Burns* (1887), 16 Cox, 195.

(*d*) *Rex v. Marsden* (1829), M. & M. 439; *R. v. Christie* (1858), 1 F. & F. 75; *R. v. Toakley* (1866), 10 Cox, 406; *R. v. Barrow* (1866), *ib.* 407; *R. v. Radcliffe* (1746), 1 W. Bl. 6; 2 St. Tr. N.S. 1019; 5 St. Tr. N.S. 32; Taylor on Evidence, s. 390; Best, 631; Kyshe, Attorney and Solicitor-General, 121.

(*e*) See *Reg. v. Shimmis* (1882), 15 Cox, C. C. 122; *Reg. v. Attwood* (1884), 29 Sol. Jo. 29; *Reg. v. Millhouse* (1885), 15 Cox, 622; *Reg. v. Beard* (1837), 8 C. & P. 142.

who is undefended should make his statement before or after the address of counsel for the other prisoner (a).

When witnesses as to facts are called for the defence, counsel for the prisoner may sum up the evidence (b), and in summing up may also speak on the whole case (c); counsel for the prosecution has a right of reply, but not where the witnesses called are only as to character (d). If counsel for the defence in his address to the jury states facts which have not been proved and calls no evidence, the judge may in his discretion allow the counsel for the prosecution to reply (e). When two prisoners are tried together, and one calls evidence but the other does not, then, if the evidence is in effect for both prisoners, the counsel for the prosecution has in strictness a right of reply, but the right is *summum jus* and ought to be exercised with great forbearance (f); if the evidence called affects only the person on whose behalf it is given, the counsel for the prosecution can only reply on the case of the prisoner who is affected by the evidence (g); indeed in one case (h), where there were several prisoners for only some of whom witnesses were called, not only was the reply of the counsel for the prosecution limited to the case of those prisoners for whom witnesses had been called, but the last word was given to the counsel for the prisoner who called no witnesses.

In a criminal trial the position of counsel for the prosecution is very different from the position of counsel for the defence and from the position of counsel for the parties in a civil trial. In civil trials, and when defending a prisoner,

(a) Archbold's Criminal Pleading, etc., 22nd ed. 190.

(b) 28 & 29 Vict. c. 18, s. 2.

(c) *Reg. v. Wainwright* (1875), 13 Cox, 171; *R. v. Dowse* (1865), 4 F. & F. 492; *Reg. v. Glass* (1865), 4 F. & F. 492.

(d) *R. v. Dowse* (1865), 4 F. & F. 492; *Reg. v. Glass* (1865), 4 F. & F. 492; but see 7 C. & P. 676, Archbold's Criminal Pleading, 190.

(e) Archbold's Criminal Pleading, 190.

(f) *Reg. v. Jordan* (1839), 9 C. & P. 119.

(g) *Reg. v. Hayes* (1838), 2 Moo. & Rob. 155; *Reg. v. Trevelli* (1882), 15 Cox, 289; *Reg. v. Kain* (1883), 15 Cox, 388.

(h) *Reg. v. Burns* (1887), 16 Cox, 195.

counsel may identify themselves with the interests of their clients, and it is the duty of counsel in such cases to struggle hard by every fair means to get a verdict; but counsel for the prosecution in a criminal trial is, it has been said, a minister of justice filling a quasi-judicial position, and his duty is to bring forward proofs of the prisoner's guilt, not as an advocate trying to get a verdict, but as an assistant of the Court trying fairly to bring out the facts (a).

7. In the sittings of a Divisional Court of the King's Bench Division, the number of counsel who are heard and the order in which they address the Court vary with the nature of the proceedings.

In *ex parte* motions only one counsel is heard and the following order is observed. If the Attorney-General and Solicitor-General are in court they are first called upon to move, then King's Counsel present in court and barristers that have patents of precedence are called upon by name according to their seniority (b); then the members of the junior bar are called upon, and, if the number of motions is so great as to make the order of precedence a matter of importance, the junior counsel who is seated in the centre of the first row is called upon to move, then those who are to his left in the order in which they are seated, then those to his right and so on from the centre of each row, first to the left and then to the right, till all the counsel in court have had an opportunity of moving once. This is termed "going through the bar." The motions then commence again with the Attorney-General and Solicitor-General and go through the bar in the same order (c).

In appeals from inferior courts (d) or in an argument on a special verdict in a criminal case (e), or on a demurrer to

(a) *Reg. v. Holchester* (1866), 10 Cox, C. C. 226, 4 F. & F. 842; *Reg. v. Webb* (1869), 4 F. & F. 862; *Reg. v. Puddick* (1865), 4 F. & F. 499; *Reg. v. O'Connell* (1844), 7 Ir. L. R. at p. 312.

(b) See *ante*, p. 93.

(c) Chitty's Archbold's Practice, 14th ed., 1382.

(d) *Hawes v. Peake* (1876), 24 W. R. 407, 33 L. T. 818.

(e) Short and Mellor's Crown Office Practice, 223.

an indictment, information, or inquisition, or on a writ of error in criminal case (a), only one counsel is heard on each side; the same rule applies to the argument on a special case, except the case is stated upon an order of Quarter Sessions and is brought before the Court on an order *nisi* to quash the judgment below, in which case all the counsel instructed on both sides may be heard (b). On showing cause against and in support of a rule *nisi* all the counsel on each side may be heard (c). On opposed motions other than appeals from inferior courts all the counsel engaged may be heard for and against the motion and one in reply (d). On the argument of any case entered in the Crown paper when a rule *nisi* has been granted, counsel for the party showing cause begins, but on a rule *nisi* to quash an order or conviction the counsel for the appellant or party who desires to displace the *status quo* begins (e). In *certiorari* counsel for the party who has obtained the rule *nisi* begins (f), on a writ of error counsel for the plaintiff in error (g), in an argument on a special verdict or a verdict subject to a special case the counsel for the prosecution (h), on the argument of a demurrer the party demurring (i). In *habeas corpus*, when a rule *nisi* has been granted, all the counsel for the party showing cause against the rule are first heard, then all the counsel for the party in support of the rule; if the prisoner or person detained is afterwards brought up by *habeas corpus*, the Court hears first all the counsel for the prisoner or person detained on a motion to discharge him

(a) Short & Mellor, 198.

(b) *Spurling v. Bantoft* (1891), 2 Q. B. at p. 390. Short's Crown Office Rules (1886), p. 64. Where a case is stated under R. S. C., 1883, O. xxxiv., two counsel on each side are heard, see *Barclay v. Pearson* (1893), 2 Ch. 154.

(c) See *Rex v. Ricketts* (1837), 6 A. & E. 537; *Reg. v. Thorogood* (1840), 12 A. & E. 183.

(d) Tidd's Practice, 9th ed., 507.

(e) Short & Mellor, 535; Crown Office Rules, 1886, r. 147.

(f) Short & Mellor, 140.

(g) *Ib.* 325.

(h) *Ib.* 223.

(i) *Ib.* 198.

from custody or detention, then all the counsel for the other side, and finally one counsel for the prisoner or person detained in reply (*a*). When a defendant is brought up for sentence on an indictment or information in the King's Bench Division, the court hears first all the counsel for the defendant and then all the counsel for the prosecution (*b*). When a defendant is brought up for sentence after judgment by default, confession, or *retraxit* the Court hears first the prosecutor's affidavits, then the defendant's, then all the counsel for the prosecution, and lastly all the counsel for the defendant (*c*); if no affidavits are produced, all the counsel for the defendant are first heard, then all the counsel for the prosecution (*d*). In proceedings for an attachment for contempt all the counsel who show cause against and for the rule *nisi* are heard; if the rule is made absolute, and the defendant is brought up before the Court for sentence, counsel for the defendant is first heard and then counsel for the prosecutor replies (*e*). In proceedings relating to articles of peace in the King's Bench Division when an application is made for an order absolute in the first instance for leave to exhibit articles of the peace and for an attachment thereon (*f*), if the application is granted, then on the sheriff bringing the defendant before the Court, counsel for the prosecutor moves that the defendant be ordered to find security for the peace (*g*); the articles are then read in the presence of the defendant, and the defendant may file affidavits in mitigation and be heard by counsel upon them or upon the articles (*h*).

8. In the Court for the Consideration of Crown Cases

(*a*) C. O. R. 1886, r. 249; *Reg. v. Baines* (1840), 12 A. & E. 213.

(*b*) C. O. R. 1886, r. 180; Short & Mellor, 233; *Rex v. Bunts* (1788), 2 T. R. 683. See *Rex v. Medley* (1834), 6 C. & P. 300.

(*c*) C. O. R. 1886, r. 181; Short & Mellor, 233; *Reg. v. Dignam* (1837), 7 A. & E. 593; *Rex v. Sutton* (1828), 7 A. & E. 594n.

(*d*) C. O. R. 1886, r. 182; Short & Mellor, 233.

(*e*) Short & Mellor, 406.

(*f*) Short & Mellor, 421; C. O. R. 1886, r. 280.

(*g*) Short & Mellor, 423; C. O. R. 1886, r. 287.

(*h*) Short & Mellor, *ib.* C. O. R. 1886, r. 287.

Reserved only one counsel is heard on each side (a). The counsel for the prisoner begins, the counsel for the Crown is then heard, and counsel for the prisoner replies. The Attorney-General or Solicitor-General has no right of final reply (b).

9. *Motions in the Chancery Division*.—The judge upon motion days calls upon each counsel in court, in turn, according to their seniority. Each counsel when called upon has the right to make two opposed motions before the next counsel is called upon (c). A motion for the discharge of a prisoner from custody is entitled to priority over all other motions (d).

10. *Court of Appeal*.—On the argument of a case in the Court of Appeal, two counsel are heard on each side (e), if the respondent is called upon, and one counsel for the appellant replies. As the Court of Appeal may have occasion to refer to the notes of counsel in the court below to supplement the judges' notes (f), and expects to be informed by counsel of the grounds of the judgment appealed against (g), it seems to follow that the counsel who were engaged in the court below, should, if it is possible, be briefed on the hearing of the appeal.

If there are separate respondents to an appeal and their interests are different, they may be heard by counsel separately in opposition to the appeal. In one case, where the circumstances were special, the Court allowed one of

(a) *Reg. v. Frost* (1840), 9 C. & P. 165.

(b) See *Reg. v. Frost* (1840), 9 C. & P. 165. Cp. *O'Connell v. The Queen* (1844), 11 Cl. & F. 230; *Lord Dunglas v. H.M.'s Officers of State for Scotland* (1842), 9 Cl. & F. 199; *Drake v. A.-G.* (1843), 10 Cl. & F. 257.

(c) Daniell's Ch. Pr., 7th ed., 1310.

(d) *Ashton v. Shorrocks* (1880), 29 W. R. 117.

(e) *Sneesby v. L. & Y. Ry. Co.* (1875), 1 Q. B. D. 42; see *Hoare v. Bremridge* (1872), 21 W. R., at p. 44. *Iles v. West Ham Union* (1882), 46 L. T. 150.

(f) *Earl de la Warr v. Miles* (1881), 19 Ch. D. 80.

(g) *Ex parte Skerratt* (1884), 28 Sol. Jo. 376. See *in re McConnell, Saunders v. McConnell* (1885), 29 Ch. D. 76.

several respondents to address the Court in support of the appeal (a).

11. In the House of Lords every appeal must be brought by petition (b), and all petitions must be signed and the reasonableness thereof be certified by two counsel (c). The printed cases which contain the statements and reasons of the appellant and the respondent must be signed by one or more counsel who either have attended as counsel in the court below, or purpose attending as counsel at the hearing of the appeal (d). Only two counsel on either side are heard in the House of Lords. The leading counsel for the appellant opens the case. The evidence on the side of the appellant is then read, and the second counsel for the appellant addresses the House. Then the leading counsel for the respondent is heard, and the evidence on his side is read, and the second counsel on that side is heard. Then one of the appellant's counsel who have been already heard replies (e). Parties to an appeal, whether co-appellants or co-respondents, if they have distinct claims and interests on the same side, are allowed to appear by separate counsel if express leave on petition has been first obtained (f). When there are separate respondents, but their case is the same, the rule is to hear only one counsel for each respondent or two for one on behalf of all (g). Where several defendants who were charged in one indictment with different illegal acts severed in their defence, and being convicted and

(a) *In re Marquis of Ailesbury's Settled Estates* (1892), 1 Ch. 506, 61 L. J. Ch. 116.

(b) 39 & 40 Vict. c. 59, s. 4.

(c) Standing Orders of the House of Lords, Annual Pr., 1905, II. 700.

(d) *Ib.* 702. See *Price v. Seeley* (1843), 10 Cl. & F., at p. 41.

(e) The House of Lords will not avoid the effect of their inflexible rule to hear only two counsel for each party in any one case by permitting one senior and one junior counsel to be heard in the opening and a third counsel in reply, *Reg. v. Millis* (1844), 10 Cl. & F. 534. See *Julius v. Bishop of Oxford* (1880), 5 App. Cas., at p. 221.

(f) Macqueen, *Practice of the House of Lords*, 205; Denison & Scott, 105; *Home v. Pringle* (1840), 8 Cl. & F., at p. 281; *Gore v. Stackpoole*, Lords Journ. xlviii., 822.

(g) *Prndergast v. Prendergast* (1850), 3 H. L. C., at pp. 217, 225.

sentenced to different punishments brought separate writs of error, it was held that they were entitled to appear by separate counsel and that such counsel were entitled to separate replies (a). In *Thellusson v. Rendlesham* (b) where a will had been impeached and the Court below had sustained and construed it in favour of two persons who were held to be the devisees benefited by the will, the next-of-kin appealed against the decision on one point, and two persons, each of whom claimed to be the devisee benefited by the will, appealed on another. As the interest of the appealing devisees was the same, so far as the appeal was concerned, the order of hearing was as follows: only one set of counsel was heard for each of the appealing devisees, and only one for each of the respondents (the persons in whose favour the Court below had decided). Counsel for the next-of-kin were then heard, one counsel for the respondents was heard in answer, and one of the appellants' counsel had a general reply.

12. *Privy Council*.—In proceedings before the Judicial Committee of the Privy Council the printed cases on both sides must be signed by one or more of the counsel who attend at the hearing of the appeal (c). Two counsel are heard on each side and no more (d). Counsel for the appellant begin, then counsel for the respondent, if called upon, are heard, and one counsel for the appellant replies (e). When there are several parties to an appeal and it is quite clear to the Court that their interests are different, the practice is to hear them by separate counsel. When there

(a) *O'Connell v. The Queen* (1844), 11 Cl. & F. 155, 9 Jur. 25; *Lord Douglas v. Her Majesty's Officers of State for Scotland* (1842), 9 Cl. & F. 199; *Drake v. Attorney-General* (1843), 10 Cl. & F. 257.

(b) (1858), 7 H. L. 430.

(c) Macpherson, *Practice of the Judicial Committee of the Privy Council*, 84, App. p. 4. Preston, *Privy Council Appeals*, 170. Where two Canadian counsel had signed a respondent's case, but neither was briefed for the hearing, the signature of an English counsel who would argue the case was required, Preston, 170.

(d) Macpherson, 125.

(e) *Henfrey v. Henfrey* (1842), 4 Moore P. C. C. 29, at p. 33.

are different parties who are in the same interest, the Court requires them to arrange together to be heard by the same counsel (a). But where there are separate appeals, each appellant has a right to be represented by two counsel, though the facts and arguments used may be the same in both cases (b). Where in one appeal there were two sets of appellants having separate interests and adverse claims against each other as well as against the respondents, two counsel were heard for each set of appellants and separate replies were allowed, the counsel for the appellants who were first on the record being allowed the first word and the last reply (c). The Court may allow persons to intervene who took no part in the proceedings below, and in such a case will allow separate counsel for the interveners to be heard (d). Where in an action there were two sets of defendants who having different interests severed in their defence in the court below, and the Court decided against one set of defendants, and the unsuccessful set of defendants appealed and made the plaintiff sole respondent, the Court allowed the other set of defendants to appear in the appeal, to lodge a separate case, and to be represented by separate counsel (e).

13. *County Court, etc.*—The trial of an action in the County Court and other inferior civil courts is similar to a trial in the King's Bench Division of the High Court, but the right to sum up the evidence given by s. 18 of the Common Law Procedure Act, 1854, does not apply to such

(a) *In re Downie & Arrindell* (1841), 3 Moore P. C. C., at p. 419; *In re Woodcroft's Patent* (1841), 3 Moore P. C. 172n.

(b) *Ib.*, p. 419. See *Prinsep v. Dyce Sombre* (1856), 10 Moore P. C. C. 234.

(c) *Jewa-Jee, etc. v. Trimbuk-Jee* (1842), 3 Moore Ind. App. 138, at p. 152.

(d) *Maharajah Ishuree Persad Narani Sing v. Lal Chutterput Sing* (1842), 3 Moore, Ind. App. 100, at p. 108. *Hocquard v. The Queen* (1857), 11 Moore P. C. C., at p. 161.

(e) *East India Co. v. Robertson* (1859), 7 Moo. Ind. App. 361. See *Nawab Unjad Ally Khan v. Mussumat Mohumdee Begum* (1867), 11 Moore Ind. App. 517.

courts, and there is no such right at common law, and the judge may refuse to allow it (*a*).

14. On the hearing before magistrates of information or complaints which can be dealt with summarily only one speech on either side is allowed on the facts (*b*).

(*a*) *Dymock v. Watkins* (1883), 10 Q. B. D. 451.

(*b*) 11 & 12 Vict. c. 43, s. 14.

CHAPTER IX.

SPECIAL FEES.

THE general rule of the bar is that a barrister is bound to accept any brief in the courts in which he professes to practise if a proper professional fee is offered and paid, and if there are no special circumstances justifying him in refusing to accept a particular brief (*a*). A fee which is in addition to the usual fee payable in any particular class of business is called a special fee. The usage of the bar as regards special fees was defined as follows by the Bar Committee (*b*). "A barrister is considered to be prepared to take any brief in the courts in which he professes to practise at a proper professional fee, according to the length and difficulty of the case. Any counsel is at liberty to say that he will not practise in a particular court without a special fee of a named amount, or that he will not go into court at all without a special fee of a named amount, but such special fees when asked should, according to the practice as hitherto understood at the Chancery bar, be asked in all cases, or in all courts, except the one or more in which the barrister usually practises. At the common law bar the practice has been governed rather by the rules of the various circuits, and the special fees to be taken by members of circuits accepting briefs on other circuits have been fixed by the rules of the circuits, and not by the

(*a*) Annual Statement of the General Council of the Bar, 1903-04, p. 15. See *O'Brien v. Cantwell* (1861), 12 Ir. Ch. R. 221; *Morris v. Hunt* (1819), 1 Chitt. 544.

(*b*) Eighth Annual Statement of the Bar Committee, 3.

individual members of the bar. It appears to have been generally understood on all circuits that no one should take a special fee, properly so called, on his own circuit. There appears, however, to be no objection in principle to a counsel having a special fee for going out of town to a circuit of which he is a member or to particular towns on that circuit, provided that the special fee is taken in all such cases. In no case ought a fee, which is really a brief fee given for getting up a case in order to conduct it in court and for conducting it there, to be divided and marked in part as a special fee merely for the purpose of paying a less fee to other counsel engaged in the case" (a). The General Council of the Bar made the following report (b) on a question referred to them with regard to special fees in the Chancery Division, where an action has been transferred for trial from one jury to another. "There is no rule of the bar that a Queen's Counsel who is not attached to a particular court of the Chancery Division cannot practise in that court without a special fee. But there is a well recognized practice which has been established for the benefit of suitors, and in order to enable them to be practically certain of obtaining the services of the Queen's Counsel whom they have briefed, for Queen's Counsel practising in the Chancery Division, who have attached themselves to a particular court, not to accept a brief in any other court in that Division unless they are paid a special fee on such brief. The Council think it both reasonable and for the benefit of suitors generally, that when a Queen's Counsel attached to a particular court of the Chancery Division who has appeared at the trial of an action in that court is asked to appear on the further consideration of such action in any court other than that to which he is attached, he should demand a special fee for so doing. . . . In those special cases in which the

(a) See Annual Statement of the General Council of the Bar, 1902-03, pp. 6-8.

(b) Annual Statement, 1898-99, 11.

further consideration ought to be heard before the same judge as presided at the trial, it has been usual for the judge presiding at the trial to reserve further consideration before himself. When that is done, the Queen's Counsel who appeared at the trial accepts the brief on further consideration without a special fee. When that is not done, the Council are of opinion that the suitor is at no disadvantage by reason of not being represented on the further consideration by the Queen's Counsel who appeared for him at the trial" (a). The Council also reported that a King's Counsel who changes his Court should not appear in the Court from which he has moved without a special fee, even in cases in which he has previously appeared as leader, and that a special fee can be claimed for every brief which takes a leader into any Court in which he does not usually practise (b). As regards special fees at Assizes and Quarter Sessions the General Council of the Bar made the following report (c). "The universal practice of the circuits since June, 1876 (when the matter was considered by a Joint Committee of all the circuits), is to require that a counsel going special on to one circuit from another circuit should, if a Queen's Counsel, have a special fee of one hundred guineas, and if a junior a special fee of fifty guineas, in addition to the brief fee, and that one member of the circuit should be employed on the side on which the counsel comes special. The leaders of the Chancery Bar approve of a rule that a similar practice should be adopted in the case of a Chancery Queen's Counsel appearing on any circuit of which he is not a member, but the juniors of the Chancery Bar who are not members of any circuit claim the right to hold a brief in any case commenced in the Chancery Division

(a) Since the date of this report the practice has been altered, and a Judge of the Chancery Division retains all motions which have been opened before him, and also "any in which the circumstances of the particular case may render retention desirable in the interests of the suitors." Annual Statement of the General Council of the Bar, 1903-04, 7.

(b) Annual Statement 1900-01, 11; *ib.* 1903-04, 6.

(c) Annual Statement, 1899-1900, p. 8.

which is tried on circuit. The Council recommend that the rule should be that the amount of special fees should be as above, and that one member of the circuit should be employed on the side where the counsel comes special, and that Chancery Juniors who are not members of any circuit should be allowed to hold briefs in cases commenced in the Chancery Division in which they have drawn the pleadings, but which are tried on circuit, provided that one member of the circuit be employed with them (a). As to the practice of the various Sessions Bars throughout the country, the Council have to report that the amount of special fee which the counsel going special is expected to have is infinitely various, ranging from five guineas to twenty-five guineas, and that the practice also varies as to the employment of members of the Sessions with the counsel going special. The Council recommend that one uniform rule should be adopted by all Sessions Bars, and consider that the rule should be that a counsel going special to Sessions, whether he belongs to the circuit on which the Sessions are situate or not, and whether he belongs to the inner or outer bar, should have a special fee of not less than ten guineas in addition to a proper brief fee, and that one member of the Sessions Bar should be employed with him. But where a special fee is marked in addition to the fee on the principal brief, no other special fee should be required for briefs in other cases connected with the same matter, entered at the same Sessions. The Council further recommend that the members of the County Sessions should have the right to attend all the Borough Sessions within the county without a special fee, and that the right of a counsel to practise at any Quarter Sessions which he has once opened should not be lost by mere non-attendance."

There is a general understanding that members of the bar should observe the rules made by the various sessions as to the conditions upon which barristers who are not

(a) The circuits have all refused to accept this part of the recommendation. Annual Statement, 1901-02, 9.

members may practise at such sessions, and to disregard such rules is contrary to the etiquette of the bar (*a*). But sessions such as those of the county of Middlesex which have once been open to all members of the bar cannot make rules closing them (*b*).

(*a*) Annual Statement of the General Council of the Bar, 1903-04, p. 9.

(*b*) *Ib.*, p. 9.

CHAPTER X.

RETAINERS.

THE Courts have no jurisdiction to interfere on questions of retainers between counsel and client (*a*). In *ex parte Elsee, in're Joiner* (*b*), the counsel for the respondent objected to Mr. Montagu, the counsel for the petitioner, being heard on the ground that Mr. Montagu was retained by the respondent. Mr. Montagu said that "he was not retained by the respondent according to the professional rule in the case of retainer, and that even if he had been retained, the Lord Chancellor sitting in Bankruptcy had not any jurisdiction, but that questions of this nature were always decided by some King's Counsel to whom the matter was referred, which course had been adopted on the present occasion." There being some doubt as to the facts, the petition stood over till the next day, when Mr. Montagu was heard for the petitioner. In the case of *ex parte Lloyd* (*c*), a petition was brought to restrain Mr. Montagu from acting as counsel for a bankrupt. Lord Eldon, L.C., expressed his "clear decided opinion that he sitting in Bankruptcy had no jurisdiction whatever to interfere with a barrister in the exercise of his discretion as to the client upon whose retainer he thought proper to act," but on Mr. Montagu's soliciting his lordship to hear the petition, his lordship heard it as *amicus curiæ*.

(*a*) *Taylor v. Clarke* (1862), 13 Ir. C. L. R. 571, at 574; *Baylis v. Grout* (1835), 2 M. & K. 316.

(*b*) (1830) Mont. 69.

(*c*) (1822) Mont. 70n.

Disputes as to the validity of a retainer are generally decided by the Attorney-General (*a*).

“Rules for regulating the practice as to retainers of counsel ” were in 1892 prepared by the Bar Committee, settled and approved by the Attorney-General and accepted by the Incorporated Law Society (*b*).

The rules are as follows :—

GENERAL RETAINERS.

I. General retainers are either ordinary or limited.

II. An ordinary general retainer applies to the Supreme Court and House of Lords.

III. A limited general retainer applies to the tribunal or tribunals or Court or Courts to which it is expressed to be limited.

IV. A separate general retainer must be given for the Privy Council.

V. A separate general retainer must be given for Parliamentary Committees.

VI. If the counsel who has accepted a general retainer from one party should be offered a special retainer or brief by another party, the general retainer entitles the party who has given it to reasonable notice before the offered special retainer or brief is accepted.

VII. Subject to these rules a general retainer lasts for the joint lives of the client and counsel, unless the same be forfeited.

VIII. In case a special retainer or brief is offered to counsel by a party other than the party from whom he has accepted a general retainer, the counsel, after giving notice to the party from whom he has accepted the general retainer of the offer of the special retainer or brief, is at liberty to accept the special retainer or brief of the other

(*a*) Twelfth Annual Statement of the Bar Committee and First of the General Council of the Bar, 15.

(*b*) Tenth Annual Statement of the Bar Committee, 2.

party, unless a special retainer or brief be given within a reasonable time by the party from whom he has accepted the general retainer.

IX. Where a general retainer has been given, and a brief is not delivered to the retained counsel in any action or other proceeding in which the party giving the general retainer is concerned, and to which it applies, or a special retainer or brief is not given within a reasonable time after a notice has been given by the counsel holding a general retainer, that a special retainer or brief has been offered to him by another party, the general retainer is forfeited; provided that the holding of a general retainer does not entitle a King's counsel to the delivery of a brief on occasions when it is usual to instruct a junior counsel only.

X. Where a general retainer has been given for one person, and he is party to a proceeding with others and appears separately, the retainer applies to that proceeding; but if he appears jointly with others, the retainer does not apply, and remains unaffected.

SPECIAL RETAINERS.

XI. A special retainer cannot be given until after the commencement of an action, appeal, or other proceeding.

XII. A special retainer in an action or proceeding in the Supreme Court gives the client a right to the services of the counsel while the action or proceeding remains in or under the control of that Court.

XIII. A special retainer in an action or proceeding other than an action or proceeding in the Supreme Court gives the client a right to the services of the counsel during the whole progress of such action or proceeding.

XIV. A counsel who has been specially retained is entitled to the delivery of a brief on every occasion to which the special retainer applies; provided always—

A special retainer does not entitle a King's Counsel to the delivery of a brief on occasions when it is usual to instruct junior counsel only.

Where more than one junior counsel has been retained, only one of such junior counsel is entitled to the delivery of a brief on occasions when it is usual to instruct one junior counsel alone.

CIRCUIT RETAINERS.

XV. A special retainer must be given for a particular assize (a).

XVI. If the venue be changed for another place on the same circuit, a fresh retainer is not required.

XVII. If the action be not tried at the assize for which the retainer is given, the retainer must be renewed for every subsequent assize until the action is disposed of, unless a brief has been delivered.

XVIII. A retainer may be given for a future assize, without a retainer for an intervening assize, unless notice of trial shall have been given for such intervening assize.

APPELAS.

XIX. When a counsel has held a brief for any party in an action or proceeding, but has not received a general or special retainer, he shall not accept a general retainer or special retainer or a brief on appeal (including in that expression appeals to the House of Lords and to the Privy Council) for any other party, without giving the original client the opportunity of retaining or delivering a brief to him.

OPINIONS AND PLEADINGS.

XX. Counsel who has drawn pleadings or advised, or accepted a brief during the progress of an action on behalf

(a) A circuit retainer does not make it compulsory upon the counsel retained to go the circuit, but only gives the client the right to the services of the counsel if he attend the assize town and the case be entered for trial. Annual Statement of the General Council of the Bar, 1898-99, 9. The party giving the retainer has the right of renewing it for the next circuit, provided he does so in a reasonable time, *i.e.* the currency of the pending circuit. *Ib.* 1899-1900, 6.

of any party shall not accept a retainer or brief from any other party without giving the party for whom he has drawn pleadings or advised, or on whose behalf he has accepted a brief, the opportunity of retaining or delivering a brief to him, but such counsel is entitled to a brief at the trial and on any interlocutory application when counsel is engaged, unless express notice to the contrary shall have been given to him with the instructions to draw such pleadings or advise, or at the time of the delivery of such brief. Provided always such counsel shall not be entitled to a brief in any case where he is unable or unwilling to accept the same without receiving a special fee.

XXI. No counsel can be required to accept a retainer or brief or to advise or draw pleadings in any case where he has previously advised another party on or in connection with the case, and he ought not so to do in any case in which he would be embarrassed in the discharge of his duty by reason of confidence reposed in him by the other party, or in which his acceptance of a retainer or brief on instructions to draw pleadings or advise would be inconsistent with the obligation of any retainer held by him, and in any such case it is the duty of counsel to refuse to accept such retainer or brief, or to advise or draw pleadings, and in case he has received such retainer or brief inadvertently to return the same (a).

PROMOTION OF COUNSEL.

XXII. The retainer of a counsel does not cease upon his being promoted to a higher rank at the bar (b).

(a) As to this rule, see Annual Statement of the General Council of the Bar, 1896-97, 9: "Counsel should act in accordance with the spirit of this rule rather than its letter, and in cases in which counsel is aware that confidence has been reposed in him by some one not his client, but who has been assisting his client with information, counsel should not afterwards act against that person in any matter to which the information so given would be material. There can, however, be no such duty towards a person who has not been the client of the counsel, unless the fact of confidence having been so reposed is clearly made known to the counsel."

(b) *Lucas v. Peacock* (1844), 8 Beav. 1.

AMOUNT OF FEES.

XXIII. The fees for general retainers are as follows:—

In Parliament (committees), *Ten Guineas*.

In all other cases, *Five Guineas*.

XXIV. The fees for special retainers are as follows:—

In Parliament (committees), *Five Guineas*.

In the House of Lords and Privy Council, *Two Guineas*.

In all other cases, *One Guinea*.

By a subsequent resolution (a) the Bar Council stated that in their opinion:—

1. Subject to Rules 19, 20, and 21 of the Retainer Rules, a special retainer is binding if duly tendered, whether accepted or not.

2. There is no rule of the profession which makes a general retainer binding on a counsel unless it is accepted by him.

Many opinions have been given by the Bar Council in regard to these rules, particularly Rules 14 and 20, the latter of which altered the old practice. The Bar Council have resolved (b) that Rules 14 and 20 should be enforced by the following practice, which is henceforth to be considered a rule of the profession:—

“When a brief is offered or delivered to any counsel, and he finds that another counsel has become entitled to a brief within the meaning of Rule 14 or 20 and has not been briefed, such first-named counsel ought, where practicable, to ascertain from the solicitor offering or delivering such brief whether there is any sufficient explanation why a brief has not been offered or delivered to such other counsel, and unless a satisfactory explanation is given ought to refuse or return the brief.”

The brief to which counsel is entitled at the trial under Rule 20 is a “regular” brief such as counsel can

(a) Annual Statement of the General Council of the Bar, 1901-02, 5.

(b) Annual Statement, 1897-98, 8.

accept; the obligation to deliver a brief is not satisfied by the delivery of a complimentary brief or of one marked with a fee such as counsel could not properly take (*a*). If counsel has become entitled to a brief and one is offered to him marked with a fee in a proportion to the leading brief fee less than two to three or three to five, and the counsel refuses the brief only on the ground that it is so marked, and the brief is offered to another counsel, these facts "are not in themselves a satisfactory explanation" of the non-delivery of the brief to the counsel entitled (*b*). Nor does a change of solicitors by itself constitute a sufficient or satisfactory explanation (*c*). If the counsel to whom the brief is delivered receives what he considers is a satisfactory explanation why the brief is not delivered to the counsel entitled, he may accept the brief and is under no obligation to communicate with such counsel (*d*).

If the client for whom counsel draws pleadings or advises is a company which goes into liquidation in the course of the action and the Official Receiver thereupon has the conduct of the action, the mere fact of liquidation, whether followed by a change of solicitors or not, would not deprive counsel of his right to a brief at the trial (*e*).

Rule 20 does not apply to proceedings after the conclusion of the trial of an action, *e.g.* to an appeal (*f*).

(*a*) Twelfth Annual Statement of the Bar Committee and First of the General Council of the Bar, 14.

(*b*) Annual Statement of the General Council of the Bar, 1900-01, 5.

(*c*) Annual Statement, 1898-99, 9.

(*d*) *Ib.*, 1901-02, 7.

(*e*) *Ib.*, 1900-01, 6.

(*f*) *Ib.*, 1898-99, 9.

CHAPTER XI.

TAXATION.

COUNSEL'S fees when paid by the solicitor may, if allowed on taxation as between party and party be recovered by the successful litigant to whom costs have been awarded (*a*); the fees paid by the solicitor for the losing side and the fees which are not allowed on party and party taxation to the winning side may be recovered from the client; these costs, if the client wishes, may also be taxed; on the taxation between solicitor and client many items are allowed which would be disallowed on party and party taxation.

For the purposes of taxation the quantum of fees to counsel, the number of counsel whose fees are allowed and the occasions on which fees are allowed for instructing counsel are matters for the discretion of the taxing-master, and the Court will not interfere unless he proceeds on some wrong principle or does not exercise his discretion (*b*).

Advice before action.—A fee to counsel for advising whether an action will lie and who are the proper parties has been allowed on solicitor and client taxation (*c*).

(*a*) See *Morris v. Hunt* (1819), 1 Chitt. 544. But a successful litigant who sues *in formâ pauperis*, in the King's Bench or Chancery Division, cannot be allowed anything on taxation for fees to counsel, *Carson v. Pickersgill*, 14 Q. B. D. 859; *Richardson v. Richardson* (1895), P. 276; *Johnson v. Lindsay & Co.* (1892), A. C. 110.

(*b*) See *Att.-Gen. v. Lord Carrington* (1843), 6 Beav. 454; *Kidston v. Empire Marine Insurance Co.* (1867), 16 L. T. 286; *Hargreaves v. Scott*, 4 C. P. D. 21; *Stanton v. Baring*, W. N. 1875, 188; *O'Brien v. Cantwell* (1861), 12 Ir. Ch. R. 221; *Brown v. Sewell* (1880), 16 Ch. D. 517, R. S. C. 1883, O. lxv. r. 27 (15).

(*c*) *Macnamara v. Malone* (1886), 18 L. R. Ir. 269.

Pleadings.—A fee to counsel for settling a writ of summons has been allowed on party and party taxation (a). Generally counsel's fees for settling pleadings are allowed on party and party taxation, but the fees of more than one counsel are not as a rule allowed (b). Counsel's fee for settling a reply, although it was only a joinder of issue, has been allowed on party and party taxation (c).

Drafts.—If in pursuance of any direction by the Court or a judge in chambers, drafts are settled by any of the conveyancing counsel of the court, the expense of procuring such drafts to be previously or subsequently settled by other counsel on behalf of the same parties on whose behalf such drafts are settled by the conveyancing counsel of the court are not allowed on taxation as between party and party or solicitor and client, unless the Court or a judge shall otherwise determine (d).

Advising.—On party and party taxation the costs of obtaining the advice of counsel on evidence and the proceedings in an action may be, and generally are, allowed by the taxing-master (e). In one case the costs of a second opinion on evidence were allowed (f).

Conferences.—Fees for conferences are allowed on party and party taxation if it is made to appear to the taxing officer that for some special reason a conference was necessary or proper (g).

Consultations.—As a rule the costs of only one consultation between the leading and junior counsel are allowed in

(a) *Tisdall v. Richardson* (1887), 20 L. R. Ir. 199; Johnson's Bills of Costs, pp. 59, 74, 287.

(b) *Davis v. Earl of Dysart* (1855), 25 L. J. Ch. 122, 322.

(c) *Tisdall v. Richardson* (1887), 20 L. R. Ir. 199. But see now R. S. C. O. xxiii. r. 1.

(d) R. S. C. O. lxx. r. 22. See *Re Jones Settled Estate* (1858), 27 L. J. Ch. 706.

(e) R. S. C. 1883, O. lxx. r. 27 (15).

(f) *Wicksteed v. Biggs* (1885), 52 L. T. 428.

(g) O. lxx. r. 27 (45). See *Kidston v. Empire Marine Insurance Co.* (1867), 16 L. T. 286.

actions in party and party taxation (*a*). But in exceptional cases the costs of several consultations will be allowed (*b*). In solicitor and client taxation more consultations than one may be allowed (*c*). In election petitions where the costs are taxed as between solicitor and client, several consultations are often necessary and may be allowed (*d*). The taxing-master is not bound to inquire into the length of each consultation and the occasion on which it was held. The amount to be allowed for consultations is in the discretion of the taxing-master, and he is not acting on a wrong principle if, in estimating the fees, he takes into consideration the number of consultations which are allowed (*e*).

Fees of counsel for settling interrogatories and special affidavits are allowed on party and party taxation in proper cases (*f*). A separate fee is not to be allowed for each affidavit, but one fee for all the affidavits proper to be settled, which are, or ought to be, filed at the same time (*g*).

Attendance at Judge's Chambers.—Costs of counsel attending at judge's chambers are not allowed even on solicitor and client taxation (*h*), unless the judge certifies for counsel. There is a difference in this respect between the practice in the Chancery Division and in the King's Bench Division. In the King's Bench Division it is necessary to ask for the certificate for counsel; in the Chancery Division the costs of attendances of counsel in chambers are always

(*a*) *Hill v. Peel* (1870), L. R. 5 C. P. 182. *Re Anglo-Austrian Printing and Publishing Union* (1894), 2 Ch. 622; *Wegmann v. Corcoran* (1880), 41 L. T. 792.

(*b*) *Commissioners of Railways v. O'Rourke* (1896), A. C. 594; *Leonhardt v. Kalle* (1895), 12 Rep. Pat. Cas. 306.

(*c*) *Lucas v. Peacock* (1844), 8 Beav. 1; *Forster v. Davies* (1863), 32 Beav. 624.

(*d*) *Hill v. Peel* (1870), L. R. 5 C. P. 182; *Tillett v. Stracey*, *ib.* 185.

(*e*) *Commissioners for Railways v. O'Rourke* (1896), A. C. 594.

(*f*) *Davies v. Marshall* (1861), 1 Dr. & Sm. 564. *In re Pender* (1847), 10 Beav. 390.

(*g*) R. S. C. 1883, O. lxx. r. 27 (15).

(*h*) R. S. C. (1883), O. lxx. r. 27 (16); O. lvi. r. 7. *In re Chapman*, 10 Q. B. D. 54.

allowed, unless there is a special order made disallowing them (a).

Commissions, views, etc.—It is unusual to allow on party and party taxation the costs of counsel attending a commission to take evidence abroad; such costs are only allowed in special circumstances (b). It is unusual to allow on party and party taxation the costs of counsel briefed to view the *locus in quo*, but in a case where the taxing-master allowed the costs, the Court refused to interfere with the master's discretion (c).

Brief fees.—These are in the discretion of the taxing-master both on party and party and on solicitor and client taxation (d). The costs of a consent brief to be produced to the registrar on behalf of a necessary party may be taxed on the same scale as if there were an appearance in court (e). Fees have been allowed for an additional brief even when it contained no new matter, but old matter in a tabulated form (f).

Number of counsel on Motions, etc. In some cases, such as interlocutory applications, etc., the costs of only one counsel are allowed on taxation. The costs of more than one counsel attending the examination of witnesses before an examiner have been disallowed on party and party taxation (g). On a motion to amend a defence, where the defendant was ordered to pay to the plaintiff reasonable costs, the costs of only one brief were allowed to the plaintiff (h). Where a notice of motion is irregularly given for the wrong court, the costs of only one counsel for the party served with the motion will be allowed on party and party

(a) *Re Gregory, Miles v. Knight* (1890), 90 L. T. (newsp.) 56; *Webb v Fitzgerald*, W. N. (1875), 244; *Greville v. Greville* (1859), 27 Beav. 597.

(b) *Lecocq v. S. E. Ry. Co.* (1866), 14 W. R. 649.

(c) *Leeds Forge Co., Ltd. v. Deighton's Patent Flue & Tube Co., Ltd.* (1903), 1 Ch. 475.

(d) See *Hill v. Peel* (1870), L. R. 5 C. P. 172.

(e) *In re Craven's Settlement* (1889), 6 Times L. R. 105.

(f) *Wakefield v. Brown* (1874), L. R. 9 C. P. 410.

(g) *Hallows v. Fernie* (1867), 16 W. R. 175.

(h) *Cargill v. Bower* (1876), 4 Ch. D. 78.

taxation (a). In a motion in the winding-up of a company to decide which of two opposing parties is to be made contributory, if it is a matter of indifference to the shareholders and creditors, the liquidator should appear by or counsel only (b). In a suit where the plaintiff and certain of the defendants had the same interest, and were represented by the same solicitor, the Court refused to allow on a solicitor and client taxation the costs of a second counsel on behalf of these defendants on an application to vary an order for payment by another defendant of a sum of money into court, and on two unopposed motions, one to refer to the master whether a proposed compromise would be for the benefit of infant, the other for confirmation of the master's report (c). But, if there is substantial work to be done, the fees of two counsel will be allowed on party and party taxation even in unopposed petitions, and where both plaintiff and defendant are represented by the same solicitor (d). The fees of two counsel briefed to oppose a motion for a further time to answer, have been allowed on party and party taxation (e). The fees of two counsel on an unopposed motion for liberty to pay money into court have been allowed on solicitor and client taxation (f). In general the costs of only one counsel attending a reference are allowed on party and party taxation, but in exceptional cases the costs of two counsel have been allowed (g). Where the costs of two counsel are properly allowed, both may be taken from the outer bar (h).

(a) *Yearsley v. Yearsley* (1854), 19 Beav. 1.

(b) *Re Overend, Gurney & Co., ex parte Musgrave* (1867), 17 L. T. N. 313.

(c) *Friend v. Solly* (1847), 10 Beav. 329.

(d) *In re Webb's Estate, Webb v. Jones* (1873), 28 L. T. N.S. 726; *Sturges v. Dimsdale* (1845), 9 Beav. 170.

(e) *Cooke v. Turner* (1842), 12 Sim. 649.

(f) *Stephens v. Lord Newborough* (1848), 11 Beav. 403.

(g) *Hawkins v. Rigby* (1860), 29 L. J. C. P. 228; *Sinclair v. G. E. Ry.* (1870), 21 L. T. N.S. 752; *Benton v. Ellis, Lever, & Co.* (1885), 1 Times L. 499; *Drew v. Josolyne* (1888), 4 Times L. R. 717; Annual Statement of General Council of the Bar, 1895-96, p. 7.

(h) *R. S. C.* (1883), O. lxv. r. 27 (47).

Trial of actions, number of counsel, two or three counsel.—It is usual to allow the costs of two counsel briefed for the trial of an action, but where plaintiff is only entitled to costs on the County Court scale (a), the costs of only one counsel will be allowed, unless the taxing officer should be of opinion that briefing more than one counsel was proper (b). Where in an administration action the defendants severed in their defence and separate costs were awarded, the costs of two counsel for one of the defendants, a trustee, whose conduct had been attacked, were allowed (c). The rule is to allow the costs of two counsel and not to allow three except in special circumstances (d). There is no rule that to enable the master to allow the costs of three briefs there must be a certain number of witnesses; the number of witnesses is the principal ingredient but not the sole one for his consideration (e). The costs of three counsel will be allowed if it is shown that it was essentially necessary for the purpose of doing justice between the parties at the hearing of the cause that three counsel should be instructed (f). In cases of difficulty the costs of three counsel have been frequently allowed (g).

Where there are no special circumstances, the costs of

(a) O. lxv. r. 12.

(b) R. S. C., O. lxv. r. 27 (46).

(c) *In re Maddock, Butt v. Wright* (1899), 2 Ch. 588; 47 W. R. 684.

(d) *Att.-Gen. v. Munro* (1849), 1 Mac. & G. 213.

(e) *Sharp v. Ashby* (1844), 12 M. & W. 732.

(f) *Pearce v. Lindsay* (1860), 1 De G. F. & J. 573.

(g) *Morris v. Hunt* (1819), 1 Chitt. 544; *General Steam Navigation Co. v. Mann* (1854), 2 W. R. 154; *Pearce v. Lindsay* (1860), 1 De G. F. & J. 573; *Stanton v. Baring*, W. N. 1875, 188; *Kirkwood v. Webster* (1878), 9 Ch. D. 239; *Lockstone v. L. B. & S. C. Ry. Co.* (1862), 12 C. B. N.S. 243; *Wentworth v. Lloyd* (1886), L. R. 2 Eq. 607; *re Charles Laffitte & Co.* (1875), L. R. 20 Eq. 650; *North Eastern Ry. Co. v. Jackson* (1874), 22 W. R. 629; *Millard v. Burroughes*, W. N. 1880, 4; *Betts v. Clifford* (1860), 1 J. & H. 74; *in re Cathcart*, W. N. 1893, 107; *The Mammoth* (1884), 9 P. D. 126; *Bidder v. Bridges*, W. N. 1887, 208; *Dashwood v. Magniac* (1892), W. N. 54; *re Anglo-Austrian Printing and Publishing Union* (1894), 2 Ch. 622; *Mounet v. Beck* (1897), 14 Rep. Pat. Cas. 850; *Pneumatic Tyre Co. v. Izion Patent Pneumatic Tyre Co.*, ib. 875; *Badische Anilin und Soda Fabrik v. La Société Chimique des Usines du Rhone*, ib. 892.

more than two counsel are frequently disallowed (*a*). The mere fact that a junior counsel in a cause has been called within the bar in the course of an action is not of itself a sufficient reason for allowing on taxation the costs of a third counsel (*b*). The rule not to allow the costs of a third counsel unless there are special circumstances, applies to solicitor and client taxation as well as to party and party taxation (*c*); but where the solicitor has told the client that he proposes to retain a third counsel and that the costs of the third counsel will probably not be allowed on party and party taxation, then the costs of the third counsel will be allowed whether the circumstances are special or not (*d*).

A fee for counsel attending judgment in other sittings than those in which the action is tried is allowed on taxation, but not a fee to hear judgment in the same sittings.

A fee to counsel for setting minutes of decree on further consideration has been allowed (*f*).

Employing a third counsel on the hearing of an appeal is an unusual expense, as only two counsel are heard in the Court of Appeal (*g*). Costs of a third counsel in such a case are only allowed on solicitor and client taxation when the client has been told beforehand that the costs of a third counsel will probably not be allowed on party and party taxation.

(*a*) *Smith v. Earl of Effingham* (1847), 10 Beav. 378; *Smith v. Bland* (1875), L. R. 19 Eq. 473; *Midland Ry. Co. v. Brown* (1853), 10 Hare App. x; *Haslam v. O'Connor* (1872), 6 Ir. R. Eq. 615; *Mason v. Brentini* (1880), L. T. 726; *Wegmann v. Corcoran* (1880), 41 L. T. 792; *Green v. Briggs* (1877), 7 Hare, 279; *Betts v. Cleaver* (1872), L. R. 7 Ch. 513; *France v. Carver*, N. 1875, 171; *Rayment v. Dimpleby*, W. N. 1877, 67; *Merchant Banking v. Maud* (1875), L. R. 20 Eq. 452; *Flockton v. Peake* (1864), 4 N. R. 4; *Leonhardt & Co. v. Kallé & Co.* (1895), 12 Rep. Pat. Cas. 306; *Glamorgan County Council v. G. W. Ry. Co.* (1895), 1 Q. B. 21.

(*b*) *Per James*, L.J., L. R. 10 Ch. at p. 540.

(*c*) *Downing College Case* (1838), 3 Myl. & Cr. 474; *Wastell v. L. & N. Ry. Co.* (1846), 14 Sim. 84.

(*d*) See *in re Broad & Broad*, 15 Q. B. D. 420.

(*e*) *Biss, in re Biss v. Biss* (1903), 2 Ch. at p. 64.

(*f*) *Armit v. Paget* (1872), 6 Ir. L. T. R. 158.

(*g*) *In re Broad & Broad* (1885), 15 Q. B. D. 252, 420.

If a brief has been delivered to counsel, the costs of the brief will be allowed on party and party taxation even if he does not actually attend the trial (*a*).

When the costs of two counsel are allowed, the brief fees of the leader and junior generally stand to one another in the proportion of three to two or five to three (*b*). The same proportion holds between the fees of a second and third counsel, when three counsel are instructed.

Retainer.—The costs of a retainer to counsel are not allowed on party and party taxation (*c*). The taxing-master has a discretion on a solicitor and client taxation to allow the costs of a retainer to the solicitor to a trustee in bankruptcy (*d*). A special fee for counsel going into a particular court or off his circuit is not allowed on party and party taxation (*e*), or on solicitor and client taxation unless the client assents (*f*).

Refreshers.—When any cause or matter is tried or heard upon *vivâ voce* evidence in open court and the trial extends over more than one day, and occupies on the first day only, or partly on the first and partly on a subsequent day or days, more than five hours without being concluded, the taxing officer may allow on party and party taxation for every clear day subsequent to that on which the five hours shall have expired, refresher fees to counsel varying from eight to ten guineas. The like allowance may be made when the evidence in chief is not taken *vivâ voce*, if the trial on hearing is substantially prolonged beyond such period of five hours by the cross-examination of witnesses whose affidavits or depositions have been used. On solicitor and client taxation larger fees may be allowed under special

(*a*) *Taylor v. Clarke* (1862), 13 Ir. C. L. R. 571; *Charman v. Brandon* (1900), 82 L. T. 369.

(*b*) Eighth Annual Statement of the Bar Committee, p. 2. Annual Statement of the General Council of the Bar, 1900-01, p. 5.

(*c*) R. S. C. 1883, O. lxx. r. 27 (44).

(*d*) *In re Nordmann, ex parte Hasluck*, 67 L. J. Q. B. 996.

(*e*) *The Warkworth*, 1 Times L. R. 659; *Parson, in re, Parson v. Parson* (1901), 2 Ch. 176; *Smith v. Earl of Effingham* (1847), 10 Beav. 378.

(*f*) *Brown v. G. W. Ry. Co.*, 3 Times L. R. 582.

circumstances (a). Any cause or matter includes a nonfeasance summons under the Companies (Winding-up) Act 1890 (b). If the trial of a cause extends over more than one day and occupies more than five hours altogether, time after the five hours have been made up is a "clear day" within the meaning of the rule (c). In calculating the five hours the master is not to exclude the time occupied by the usual midday adjournment of the Court (d). When a trial extends over more than one day, Saturday, though not a full day, is counted as a clear day (e). If a cause begins at 11 a.m. on one day, occupies five hours on the first day and is finished on the next day at 12.30 a refresher may be allowed (f). But if a cause begins at 12 on one day, takes the whole of the day and finishes about 11 on the next day, a refresher cannot be allowed (g). Where a cause lasted four whole days and three hours on the fifth day, and the judge required a further hearing on one point and adjourned the hearing, and the whole of the sixth day was occupied with the further point, it was held that refreshers for five days ought to be allowed (h).

The master has a discretion to allow or disallow refreshers; in one case where he refused to allow a refresher for the first day, after five hours had been taken on the ground that the fees marked on the brief ought to have covered that, his decision was upheld (i). The master may disallow refreshers on the ground that counsel was not present after the first day of the hearing (j). The effect

(a) R. S. C. 1883, O. lxv. r. 27 (48). See *Harrison v. Wearing* (1879), Ch. D. 206; *Smith v. Daniell* (1876), L. R. 18 Eq. 649; 34 L. T. 899.

(b) *Re Anglo-Austrian Printing and Publishing Union* (1894), 2 Ch. 6.

(c) *O'Hara, Matthews & Co. v. Elliott & Co.* (1893), 1 Q. B. 362; *Courier* (1891), P. 355.

(d) *Collins v. Worley* (1889), 60 L. T. 748.

(e) *Dunning v. Grosvenor Dairies, Ltd.* (1901), W. N. 218.

(f) *Wicksteed v. Biggs* (1885), 52 L. T. 428.

(g) *Brown v. Sewell* (1880), 16 Ch. D. 517.

(h) *Boswell v. Coaks* (1887), 36 Ch. D. 444.

(i) *Smith v. Wills* (1885), 53 L. T. 386.

(j) *Macleod v. Thrupp* (1892), 37 Sol. Jo. 31.

of O. lxv. r. 27 subr. (29), (a), is that a taxing-master now has on party and party taxation a discretion to allow refresher fees to counsel exceeding the maximum allowed by subr. (48) (b). When two salvage actions against the same ship were placed in the list for trial on the same day and with the consent of counsel the judge directed that the evidence taken in the first action should, as far as applicable, be used as evidence in the second, and both actions were tried together and occupied eight hours fifty minutes spread over parts of three days, different counsel being instructed in each action, it was held that refreshers ought to be allowed in the second action as well as in the first, inasmuch as the attendance of counsel engaged in each action was necessary during the hearing of both (c).

A client may give a solicitor authority, express or implied, to instruct a particular counsel and to give him such special fees by way of refresher or otherwise as may be necessary to secure his services. In such a case special refreshers may be allowed on taxation between solicitor and client which would not be allowed without such authority (d). On this principle special refreshers of fifty guineas a day paid to a leader have been allowed on solicitor and client taxation. But there is no rule that where special refresher fees have been paid to a leader, the refreshers to his juniors should bear the regular proportions (two-thirds or three-fifths) (e) to the leader's refreshers, and in such a case, where there is no authority to pay special refreshers to any one but the leader, the refreshers to the juniors would be at the ordinary rate (f).

The amount of refreshers to be allowed on taxation in the County Palatine Court of Lancaster is in the discretion

(a) R. S. C., January, 1902.

(b) *Cavendish v. Strutt* (1904), 1 Ch. 524; *Stewart & Co. v. Weber* (1903), 19 Times L. R. 722.

(c) *The Hestia*, W. N. 1895, 100.

(d) *In re Harrison*, 33 Ch. D. 52.

(e) Annual Statement of the General Council of the Bar, 1896-97, 11.

(f) *In re Harrison*, 33 Ch. D. 52.

of the taxing-master of that Court and he is not limited by the rules of the Supreme Court (a).

The principle on which refreshers are allowed is that when a solicitor delivers a brief in a witness action, it is sometimes impossible to judge how long the case is likely to last and therefore to fix a proper fee; the solicitor is consequently assumed, when he fixes the fee, to have supposed that daily refreshers would be allowed; this principle applies equally to witness cases in courts of first instance as to cases in the Court of Appeal when witnesses are heard. But the principle does not apply to non-witness actions or actions where the trial is not prolonged by the cross-examination of witnesses whose affidavits or depositions have been used or to hearings in the Court of Appeal when no witnesses are heard. In such cases refreshers properly so called, that is fixed daily sums, are not, strictly speaking, allowed, but where there is a miscalculation and proper fees have been marked on the brief originally, the master may allow an additional fee to correct the miscalculation; it does not follow that because a case in the Court of Appeal takes several days, the master ought to add to the fee; what he should do is "to look at the whole thing and see whether proper fees have been marked, and if he thinks there has been a miscarriage by reason of any miscalculation at the time when the fees are marked, he ought to correct it" (b).

The allowance of counsel's fees on taxation in the Court of Appeal is governed by certain scales; the scales vary with the amount recovered in the action, and in some cases a certificate of the judge is required before counsel's fees are allowed on party and party taxation (c).

House of Lords.—Costs of more than two counsel

(a) *Ebrard v. Gassier*, No. 2 (1887), 55 L. T. 741.

(b) *Easton v. London Joint Stock Bank* (1888), 38 Ch. D. 25; *explains Svendsen v. Wallace* (1885), 16 Q. B. D. 27; *Edgington v. Fitzmaurice* (1889), 29 Sol. Jo. 650.

(c) County Courts Act, 1888 (51 & 52 Vict. c. 43, s. 118); County Court Rules, 1903, App. IV., items 85-94, pp. 605-6. See *Atkinson v. Mayo* (1896), 1 Q. B. 393; *Heap v. Peart* (1891), 1 Q. B. 110.

only rarely allowed on taxation in the House of Lords (*a*). Retainers are allowed in party and party taxation (*b*). When a case takes more than a certain time, refreshers are allowed on taxation as fixed sums (*c*).

Privy Council.—The costs of two counsel are generally allowed in the Privy Council on party and party taxation; only very rarely are the costs of three counsel allowed (*d*). In the Privy Council as in the House of Lords, when a case takes more than a certain time, refreshers are allowed on taxation as fixed sums (*e*).

Counsel's Clerks.—When fees are paid to counsel, it is usual to pay certain fees to his clerk. These fees are allowed on taxation and there is a fixed scale determining their amount (*f*). The scale of counsel's clerk's fees in civil and in criminal proceedings is the same (*g*).

(*a*) Denison & Scott House of Lords Appeal Practice, 33; Daniell's Ch. Pr., 7th ed., 1093, where it is stated that, in *Pole v. Leask*, the costs of three counsel were allowed.

(*b*) See Webster Parl. Costs 4th ed., 331, 336.

(*c*) *Easton v. Joint Stock Bank*, per Cotton, L.J., 38 Ch. D. at p. 34.

(*d*) Safford & Wheeler, Privy Council Practice, 871; Preston, Privy Council Appeals, 119.

(*e*) *Easton v. Joint Stock Bank*, per Cotton, L.J., 38 Ch. D. at p. 34.

(*f*) R. S. C., O. lxx. r. 27 (51); Second Annual Statement of the Bar Committee, p. 2. See *ex parte Cotton*, 9 Beav. 107.

(*g*) First Annual Report of the Bar Committee, p. 1.

CHAPTER XII.

OFFICES.

THERE are certain offices which can only be filled by barristers, and others which can only be filled by barristers or solicitors, or other persons having specified qualifications.

1. The following appointments are reserved for barristers or those who have been barristers.

The office of Lord of Appeal in Ordinary can only be filled by a person who has held for not less than two years certain "high judicial offices," or has been for not less than fifteen years a practising barrister in England or Ireland or a practising advocate in Scotland (*b*).

The office of Judge of the Court of Appeal is open to a Judge of the High Court of not less than one year's standing and to barristers of fifteen years' standing (*c*).

To be a barrister of not less than ten years' standing is a qualification for the appointments of a Judge of the High Court (*d*), a Judge of the Salford Hundred Court (*e*), a puisne Judge, Chairman or Deputy-chairman of the quarter sessions for the County of London (*f*), a Master in Lunacy (*g*), and Registrar in the Land Registry (*h*). A judge of the Provincial Courts of Canterbury and York must be either

(*a*) See Cordery on Solicitors, 3rd ed., App. II., p. 474.

(*b*) 39 & 40 Vict. c. 59, s. 6.

(*c*) 36 & 37 Vict. c. 66, s. 8; 14 & 15 Vict. c. 83, s. 1.

(*d*) 36 & 37 Vict. c. 66, s. 8.

(*e*) 31 & 32 Vict. c. cxxx., s. 14.

(*f*) 51 & 52 Vict. c. 41, s. 42 (1).

(*g*) 53 Vict. c. 5, s. 111 (3).

(*h*) 38 & 39 Vict. c. 87, s. 106.

barrister who has been in actual practice for ten years, or a person who has been a judge of one of the Superior Courts (*a*). Only conveyancing counsel in actual practice who have practised as such for ten years at least can be appointed Conveyancing Counsel to the Court (*b*).

To be a barrister of at least seven years' standing is a qualification for the appointments of County Court Judge (*c*), a deputy County Court Judge (*d*), Assistant Barrister or Assessor in the Liverpool Court of Passage (*e*), a Revising Barrister (*f*), Secretary to the Lunacy Commissioners (*g*), a Stipendiary Magistrate for a borough appointed under s. 161 of the Municipal Corporations Act, 1882 (*h*), and a Deputy or Assistant Judge of a borough or other local court of record (*i*). To be a Deputy Judge of the City of London Court (*j*), or of the Mayor's Court (*k*), or to be a Stipendiary Magistrate in the Metropolitan Police District (*l*), a person must have practised as a barrister for at least seven years.

To be a barrister of five years' standing is a qualification for the offices of Judge of one of the High Courts of Judicature in India (*m*), Recorder of a borough having a separate court of quarter sessions (*n*), a Deputy (*o*), or Assistant Recorder (*p*), a Deputy Judge of the Salford

(*a*) 37 & 38 Vict. c. 85, s. 7.

(*b*) 15 & 16 Vict. c. 80, s. 41.

(*c*) 51 & 52 Vict. c. 43, s. 8.

(*d*) *Ib.*, s. 18.

(*e*) 4 & 5 Wm. IV. c. xcii., s. 2; 56 & 57 Vict. c. 37, s. 6.

(*f*) 6 & 7 Vict. c. 18, s. 28; 37 & 38 Vict. c. 53, s. 6.

(*g*) 53 Vict. c. 5, s. 154.

(*h*) 45 & 46 Vict. c. 50.

(*i*) 35 & 36 Vict. c. 86, s. 7.

(*j*) 15 Vict. c. lxxvii., s. 8.

(*k*) 20 & 21 Vict. c. clvii., s. 43.

(*l*) 2 & 3 Vict. c. 71, s. 3.

(*m*) 24 & 25 Vict. c. 104, s. 2. Irish barristers and Scotch advocates are also eligible for this office.

(*n*) 45 & 46 Vict. c. 50, s. 163. This does not include the Recorder of the City of London, an office which has in modern times always been held by barristers.

(*o*) *Ib.* 166.

(*p*) *Ib.* 168.

Hundred Court (*a*), a Deputy Judge of a borough civil court if appointed under s. 175 of the Municipal Corporations Act, 1882, a Stipendiary Magistrate if appointed under 26 and 27 Vict. c. 97, s. 3, and a paid legal Commissioner in Lunacy (*b*).

To be a barrister of three years' standing is a qualification for the office of Examiner of the High Court (*c*).

The Common Sergeant of the City of London and the Judge of the City of London Court must be "duly qualified" barristers (*d*).

There are certain other offices which are invariably filled by barristers but for which there is no express statutory qualification; to this class belong the offices of Lord Chancellor and Attorney and Solicitor-General. The office of Treasury Solicitor has been of recent years generally held by a barrister. The solicitors of the treasury, customs, excise, post office, stamp duties, or any other branch of his Majesty's revenue, the solicitor of the City of London, and the assistant of the "council for the affairs of the admiralty or navy," and the solicitor to the board of ordnance need not be qualified under the Solicitors Act (*e*). Some of these offices are held by barristers.

2. For the following appointments barristers are eligible, but jointly with solicitors and in some cases other persons.

A salaried clerk of a petty sessional division or a clerk to the justices of a borough must be either a barrister of not less than fourteen years' standing or a solicitor, or must have served for not less than seven years as clerk to a police or stipendiary magistrate, or to a metropolitan police court or to one of the police courts of the City of London, or must have served for not less than fourteen years as, or as assistant

(*a*) 31 & 32 Vict. c. cxxx., s. 17.

(*b*) 53 & 54 Vict. c. 5, s. 151 (2).

(*c*) R. S. C., O. xxxvii., r. 40.

(*d*) 51 & 52 Vict. c. 41, s. 42 (14).

(*e*) 6 & 7 Vict. c. 73, s. 47

to, a clerk of a petty sessional division, or a clerk to the justices of a borough (*a*).

The Director of Public Prosecutions must be either a barrister or solicitor in actual practice and of not less than ten years' standing (*b*). The representative of the Director of Public Prosecutions on the trial of an election petition must be either a barrister or solicitor of not less than ten years' standing (*c*).

A District Registrar in the Land Registry must be either a barrister or solicitor or certificated conveyancer of not less than ten years' standing (*d*).

A Registrar, or Assistant, or Deputy Registrar in Admiralty must be a barrister or solicitor of ten years' standing (*e*).

An Assistant Director of Public Prosecutions must be a barrister or solicitor in actual practice and of not less than seven years' standing (*f*).

A person is not qualified to be appointed a Master of the Supreme Court, unless he is or has been a practising barrister or solicitor of five years' standing or has practised for five years as a special pleader or as a special pleader and barrister (*g*).

An Assistant Registrar (*h*) or an Assistant District Registrar (*i*) in the Land Registry must be a barrister or solicitor or certificated conveyancer of not less than five years' standing.

No person can be appointed Clerk of Assize, unless he has, during a period of not less than three years, been either a barrister in actual practice or a special pleader or conveyancer in actual practice or a solicitor in actual practice

(*a*) 40 & 41 Vict. c. 43, s. 7.

(*b*) 42 & 43 Vict. c. 22, s. 4.

(*c*) 46 & 47 Vict. c. 51, s. 43 (7).

(*d*) 38 & 39 Vict. c. 87, s. 119.

(*e*) 24 & 25 Vict. c. 10, s. 27.

(*f*) 42 & 43 Vict. c. 22, s. 4.

(*g*) 42 & 43 Vict. c. 78, s. 10.

(*h*) 38 & 39 Vict. c. 87, s. 106.

(*i*) *Ib.*

or a subordinate officer of a Clerk of Assize on circuit (c). The expression "Clerk of Assize" includes "Clerk of the Crown and Associate on circuit and any other office the duties of which were on the 9th August, 1869, or may at any time afterwards be performed by the Clerk of Assize" (d).

The following offices may be held by either a barrister or a solicitor, but in the case of a barrister no standing is specified — deputy of a borough coroner (e), judge of inferior Court of Record (d), the deputy judge of such court if appointed under 8 and 9 Vic. c. 127, s. 12, the Registrar or District Registrar in the Probate and Divorce Division (e), and an Examiner in Admiralty (f).

As regards some of the above-named appointments there are express provisions forbidding the holder to practise at the bar, *e.g.* County Court Judge (51 and 52 Vic. c. 43, s. 14), Master of Supreme Court (7 W. IV. and 1 Vic. c. 30, s. 15), Director and Assistant Director of Public Prosecutions (42 and 43 Vict. c. 22, s. 4), Registrar or District Registrar of the Probate and Divorce Division (20 and 21 Vict. c. 77, s. 21). The District Registrar or Assistant District Registrar in the Land Registry may practise with the consent of the Lord Chancellor (38 and 39 Vict. c. 87, s. 119). The Clerk of Assize and the Associate cannot while the circuit lasts be "of counsel with any persons within the circuit otherwise than to that office or appertaineth" (33 Henry VIII. c. 24, s. 6).

Some of the above-named appointments barristers usually hold and continue to practise while holding them, *e.g.* the following: Recorder or Deputy and Assistant Recorder, Conveyancing Counsel to the Court, Revising Barrister, Examiner, Judge or Deputy Judge of a borough court.

The Attorney and Solicitor-General are precluded by

(a) 32 & 33 Vict. c. 89, s. 3.

(b) *Ib.*, s. 8.

(c) 45 & 46 Vict. c. 50, s. 172.

(d) 8 & 9 Vict. c. 127, s. 9.

(e) 20 & 21 Vict. c. 77, s. 20.

(f) 24 & 25 Vict. c. 10, s. 28.

Treasury Minute now in force from undertaking any business on behalf of private clients (*a*).

There are some offices and occupations the holding or following of which is inconsistent with practising as a barrister. The General Council of the bar have passed a resolution that a "barrister holding the office of Town Clerk, Clerk to Guardians or similar public body, ought not to practise at the bar" (*b*). They have also expressed an opinion that the office of Vestry Clerk is inconsistent with the position of a practising barrister, and that it is not desirable that a barrister in practice should hold the office of Superintendent Registrar of Births, Deaths, and Marriages (*c*), or of Public Analyst under the Sale of Food and Drugs Act (*d*).

By the declaration which a student now makes before he is called to the bar he undertakes, so long as he remains a barrister, not to be or act as an attorney-at-law, solicitor, writer to the signet, writer of the Scotch courts, proctor, notary public, clerk in Chancery, parliamentary agent, agent in any court original or appellate, chartered or incorporated or professional accountant, or to act directly or indirectly in any such or similar capacity or in the capacity of clerk of or to any of the persons above described, or be or act as clerk of or to any judge, barrister, conveyancer, special pleader, equity draftsman, or clerk of the peace or of or to any officer in any court of justice. He also undertakes not, while he is in practice as a barrister, to be or act as registrar of any court, or clerk to any justice of the peace, or official provisional assistant or deputy receiver or liquidator under any Bankruptcy or Winding-up Act, or as clerk to any such registrar, receiver or liquidator, or to act in any such or similar capacity or to be or act in the service of any such registrar, receiver, or liquidator, or to be or

(*a*) Kyshe, Attorney and Solicitor-General, 52.

(*b*) Annual Statement, 1896-97, p. 9; Annual Practice, 1905, II. 669.

(*c*) Annual Statement, 1899-1900, 5.

(*d*) *Ib.*, 1898-99, p. 9.

act as a town clerk, clerk to a town clerk, clerk to a board of guardians or overseers, or clerk in the office of a county council, or to hold any similar office (a).

There is a generally understood rule of the profession that a barrister who holds the office of magistrate in a county, should not practise at petty or quarter sessions in the county (b). It is undesirable that a barrister who holds such a position should appear as counsel before a Licensing Committee composed of justices of the county (c). He should not practise in the Crown Court at the assizes for the county but there are many cases in which it is undesirable that he should do so, *e.g.* where prisoners have been committed for trial at the petty sessions where he sits as a magistrate (d).

(a) Consolidated Regulations of the Four Inns of Court, April, 1901, p. 5. See Appendix, p. 153.

(b) Annual Statement of the General Council of the Bar, 1896-97, p. 1.

(c) *Ib.*, 1901-02, p. 6.

(d) *Ib.*, 1896-97, p. 10.

APPENDIX.

CONSOLIDATED REGULATIONS

OF THE SEVERAL SOCIETIES OF LINCOLN'S INN, THE MIDDLE TEMPLE, THE INNER TEMPLE, AND GRAY'S INN (HEREINAFTER DESCRIBED AS THE FOUR INNS OF COURT), AS TO THE ADMISSION OF STUDENTS, THE MODE OF KEEPING TERMS, THE EDUCATION AND EXAMINATION OF STUDENTS, THE CALLING OF STUDENTS TO THE BAR AND THE TAKING OUT OF CERTIFICATES TO PRACTISE UNDER THE BAR.

Admission of Students.

1. EVERY person not otherwise disqualified, who shall have passed a public examination at any University within the British dominions, or for a Commission in the Army or Navy, or for the Indian Civil Service, or for the Consular Service, or for Cadetships in the three Eastern Colonies of Ceylon, Hong Kong, and the Straits Settlements, shall be entitled to be admitted as a student, without passing a preliminary examination, but subject to Rule 7.

2. Every other person, except such as come under Rules 14, 16, 17, and 18, applying to be admitted as a student, shall, before such admission, have satisfactorily passed an examination in the following subjects, viz. :—

- (a) The English Language,
- (b) The Latin Language, and
- (c) English History ;

Provided that the Board of Examiners mentioned in Rule 3 shall have power to report any special circumstances to the Masters of the Bench of the Inn of Court of which any person

may desire to be admitted as a student, and that the Masters of the Bench of such Inn shall have power, with or without such report, to relax or dispense with this regulation, in whole or in part, in any case in which they may think special circumstances so reported, or otherwise ascertained by the Bench, justify a departure from this regulation. In the case of a student who is a native of India, that fact shall be a special circumstance sufficient to justify an examination in the Latin Language being dispensed with, upon application to the Masters of the Bench.

3. Such examination shall be conducted by a joint Board, to be appointed by the four Inns of Court.

4. For constituting such Board, each of the four Inns of Court shall appoint four examiners, and the Council of Legal Education shall have power to allot such remuneration as the Council shall think fit to such examiners.

5. The examiners shall attend according to a rota to be fixed by themselves and two shall be a quorum.

6. Meetings of the examiners shall be held at least once in every week during each term, as hereinafter defined, and once in the week next preceding each term, and at such other times as shall be appointed in accordance with any order of the Board ;

Provided that no examiner need attend unless two clear days' notice prior to the day appointed for his attendance shall have been given to the Secretary of the Board, by at least one candidate, of an intention to present himself on that day for examination.

7. No Attorney at Law, Solicitor, Writer to the Signet, or Writer of the Scotch Courts, Proctor, Notary Public, Clerk in Chancery, Parliamentary Agent, or Agent in any Court original or appellate, Clerk to any Justice of the Peace, Registrar of any Court, Official, Provisional Assistant or Deputy Receiver or Liquidator under any Bankruptcy or Winding-up Act, or chartered or incorporated or professional Accountant, or person acting directly or indirectly in any such or similar capacity, and no Clerk to, or person acting in the service of, any such person as aforesaid (except as a pupil in a Solicitor's office) ; and no Clerk of or to any Judge, Barrister, Conveyancer, Special Pleader, Equity Draftsman, Clerk of the Peace, or of or to any officer in any Court of justice, shall be admitted as a student at any Inn of Court until such person shall have entirely and *bonâ fide* ceased

to act or practise in any of the capacities above-named or described; and if on the Rolls of any Court, shall have taken his name off the Rolls thereof.

8. The following forms shall be adopted by each of the four Inns of Court on application for admission as students :—

Declaration to be made by the Applicant.

I, of a British subject (a) aged
of the son of of , in
the county of [add father's profession, if any,
and the condition in life and occupation, if any, of the applicant]
do hereby declare that I am desirous of being admitted
a student of the Honourable Society of for the purpose
of being called to the Bar, or of practising under the Bar, and
that I will not, either directly or indirectly, apply for or take out
any certificate to practise, directly or indirectly, as a Pleader, or
Conveyancer, or Draftsman in Equity, without the special permission
of the Masters of the Bench of the said society.

And I do hereby further declare that I am not an Attorney-at-Law, a Solicitor, a Writer to the Signet, a Writer of the Scotch Courts, a Proctor, a Notary Public, a Clerk in Chancery, a Parliamentary Agent, an Agent in any Court original or appellate, a Clerk to any Justice of the Peace, a Registrar of any Court, or an Official, Provisional, Assistant, or Deputy Receiver, or Liquidator, under any Bankruptcy or Winding-up Act, or chartered or incorporated or professional Accountant, nor do I act, directly or indirectly, in any such or similar capacity, or in the capacity of clerk of or to any of the persons above described, or in the service of any of the persons above described (except as a pupil in a Solicitor's office), or as Clerk of or to any Judge, Barrister, Conveyancer, Special Pleader, Equity Draftsman, or Clerk of the Peace, or of or to any officer in any Court of Justice.

Dated this day of

(Signature)

In addition to making the above declaration, the applicant shall obtain two separate certificates, each to be signed by a Barrister of five years' standing, in the following form :—

(a) If the applicant is not a British subject omit the words "British subject," and state nationality.

11. Students who shall at the same time be members of any of the Universities of Oxford, Cambridge, Dublin, London, Durham, the Royal University of Ireland, St. Andrews, Aberdeen, Glasgow, Edinburgh, or the Victoria University, Manchester, shall be enabled to keep Terms by dining in the halls of their respective Inns of Court any three days in each Term.

12. Students who shall not at the same time be members of any of the said Universities shall be enabled to keep Terms by dining in the halls of their respective Inns of Court any six days in each term.

13. No day's attendance in Hall shall be available for the purpose of keeping Term, unless the student attending shall have been present at the grace before dinner, during the whole of dinner, and until the concluding grace shall have been said, unless the acting treasurer on any day during dinner shall think fit to permit the student to leave earlier.

Solicitors.

14. A student who, at any time previously to his admission at an Inn of Court, was a solicitor in practice for not less than five consecutive years, either in England or in any Colony or Dependency, but who in either case was admitted in England, and in accordance with Rule 7 has ceased to be a solicitor, before his admission as a student, may be examined for Call to the Bar without keeping any Terms, and may be called to the Bar upon passing the public examination required by these rules, without keeping any Terms ;

Provided that such solicitor has given at least twelve months' notice in writing to each of the Four Inns of Court, and to the Incorporated Law Society, of his intention to seek Call to the Bar, and produces a certificate that he is a fit and proper person to be called to the Bar, signed, if his practice was in England, by two members of the Council of the Incorporated Law Society, and, if his practice was in a Colony or Dependency, by the Chief Justice of such Colony or Dependency.

A student desiring to take advantage of this rule is to pay the same fees as are payable by other students, make the usual deposit, enter into the usual bond for commons, and pay the sum of £5 5s. for the forms of notice required by this rule, in addition to the usual student's fees on entrance to an Inn of Court.

A student coming under this rule may be exempted by the Masters of the Bench of the Inn to which he seeks admission from passing the examination preliminary to admission.

Dealings between Members of the Bar and Solicitors.

15. Any dealings between Members of the Bar and Solicitors as regards sharing costs or profits in any shape are incompatible with the discipline of the Bar.

Irish Barristers.

16. So long as the regulations affecting the Call to the Bar in Ireland remain substantially as at present, any member of the Bar of Ireland of three years' standing at the Irish Bar may, upon presenting a certificate of his Call duly authenticated, and a certificate from the Attorney-General or the Solicitor-General of Ireland that the applicant is a fit and proper person to be called to the English Bar, become a member of an Inn of Court and be called to the English Bar upon keeping three Terms without submitting to any examination.

Colonial Barristers.

17. While the two branches of the profession are kept distinct in New South Wales, Ceylon, and the Cape of Good Hope, as at present, and the regulations affecting the Call to the Bars of those colonies remain substantially as they are at present, any member of the Bar of New South Wales, or of the Bar of Ceylon, and any member of the Bar of the Cape of Good Hope, qualified under the Charter of June, 1834, the Acts of 1858 and 1873 or either of them, being a barrister of three years' standing, may, on presenting a certificate of Call to any of such Bars duly authenticated, and a certificate by a Judge of the Supreme Court of the colony, and by the Attorney-General or Senior Law Officer thereof, that the applicant is a fit and proper person to be called to the English Bar, become a member of any Inn of Court; and be called to the English Bar on keeping three Terms without submitting to any examination.

Vakils.

18. (1) A Vakil on production of a certificate that he is on the roll of Vakils of a High Court of India, shall not be required to pass the preliminary examination under Rule 2.

(2) A Vakil, on production of a certificate from a barrister that he has attended, as a student, for twelve months in the said barrister's chambers in London, shall be granted a dispensation of four Terms, in addition to such Terms as may be dispensed with by his Inn of Court, under Rule 59, by reason of his having passed his Bar examination with honours.

Calling to the Bar.

19. Every student shall have attained the age of twenty-one years before being called to the Bar.

20. Every student, except such as come under Rules 14, 16, 17, and 18, shall have kept twelve Terms before being called to the Bar, unless any Term or Terms shall have been dispensed with under special circumstances by the Benchers of the Inn;

Provided that in no case shall a dispensation of a greater number than two Terms be granted.

21. Except in cases within Rule 16 or 17, no student shall be called to the Bar unless he has, to the satisfaction of the Council of Legal Education, passed a public examination for the purpose of ascertaining his fitness to be called to the Bar, and obtains from the council a certificate of having passed such examination.

22. No student shall be called to the Bar until his name and description shall have been screened in the Hall, Benchers' room, and Treasurer's or Steward's office, of the Inn of which he is a student, twelve days in Term before such call.

23. The name and description of every such student shall be sent to the other Inns, and shall also be screened for the same space of time in their respective Halls, Benchers' rooms, and Treasurers' or Stewards' offices.

24. No Call to the Bar shall take place except during a Term; and such call shall be made on the same day by each of the Inns, namely, on the sixteenth day of each Term, unless such day shall happen to be Saturday or Sunday, and in such case on the Monday after, and every student shall make the following declaration previous to Call.

Declaration to be made by a Student before Call to the Bar.

I, _____ being desirous of being called to the Bar by the Honourable Society of _____ do hereby declare and undertake as follows:—

(1) *That I am not a person in Holy Orders [or that I, being a person in Holy Orders, have not during the year next before the date of this declaration, held or performed any clerical preferment or duty, or performed any clerical functions, and do not intend any longer to act as a clergyman].*

(2) *That I am not and have never since my admission as a student of this Honourable Society been an Attorney-at-Law, a Solicitor, a Writer to the Signet, a Writer of the Scotch Courts, a Proctor, a Notary Public, a Clerk in Chancery, a Parliamentary Agent, an Agent in any Court original or appellate, a Clerk to any Justice of the Peace, a Registrar of any Court, an Official Provisional Assistant or Deputy Receiver or Liquidator under any Bankruptcy or Winding-up Act, or a chartered or incorporated or professional accountant (a) or acted directly or indirectly in any such or similar capacity, or in the capacity of Clerk of or to any of the persons above described, or in the service of any of the persons above described (except as a pupil in a Solicitor's office), or as a Clerk of or to any Judge, Barrister, Conveyancer, Special Pleader, Equity Draftsman, or Clerk of the Peace, or of or to any Officer in any Court of Justice.*

(3) *That I will not, if called to the Bar, and while and so long as I remain a Barrister, be or act as an Attorney-at-Law, a Solicitor, a Writer to the Signet, a Writer of the Scotch Courts, a Proctor, a Notary Public, a Clerk in Chancery, a Parliamentary Agent, an Agent in any Court original or appellate, or a chartered or incorporated or professional Accountant, or act directly or indirectly in any such or similar capacity, or in the capacity of clerk of or to any of the persons above described, or in the service of any of the persons above described, or be or act as Clerk of or to any Judge, Barrister, Conveyancer, Special Pleader, Equity Draftsman, or Clerk of the Peace, or of or to any Officer in any Court of Justice, and that I will not while and so long as I am in practice as a*

(a) In the case of a student who was a member of any Inn of Court prior to the 22nd March, 1901, the words "or a chartered or incorporated or professional Accountant" may be omitted in this clause of the declaration.

Barrister be or act as a Registrar of any Court, or a Clerk to any Justice of the Peace, or be or act as an Official Provisional Assistant or Deputy Receiver or Liquidator under any Bankruptcy or Winding-up Act, or be or act as Clerk of or to any such Registrar, Receiver, or Liquidator, or act in any such or similar capacity, or be or act in the service of any such Registrar, Receiver, or Liquidator, nor be nor act as a Town Clerk, a Clerk to a Town Clerk, a Clerk to a Board of Guardians or Overseers, or a Clerk in the Office of a County Council, nor will I hold any similar office.

Dated this day of 190

(Signature)

Certificates to practise under the Bar.

25. No student shall be allowed to take out a certificate to practise under the Bar without the special permission of the Masters of the Bench of the Inn of Court of which he is a student, to be given by order of such Masters, and no such permission shall be granted to any student unless he shall be qualified to be called to the Bar, and the regulations, as to screening names in the Halls, Benchers' rooms, and Treasurers' or Stewards' offices, applicable to students desirous of being called to the Bar, shall be applicable to students desirous of practising under the Bar. Such permission shall be granted for one year only from the date thereof, but may be renewed annually.

Council of Legal Education.

26. The Council of Legal Education shall consist of twenty benchers, five to be nominated by each Inn of Court, of whom four shall be a quorum. The Members of the Council shall remain in office for two years, and each Inn shall have power to fill up any vacancy that may occur in the number of its nominees during that period. To this Council shall be entrusted the power and duty of superintending the education and examination of students, and of arranging and settling the details of the several measures which may be deemed necessary to be adopted for those purposes, or in relation thereto, and such other matters as are herein in that behalf mentioned.

The following regulations shall, as regards the powers of the

Council, be directory only, and shall be subject to such modifications and amendments as the Council shall deem expedient, but any such modification or amendment shall be forthwith reported to the Four Inns, and shall be discontinued if objected to by any one of them :—

The Committee of Education or Board of Studies.

27. The Council shall appoint a Committee of the Members of the Council, or, if deemed expedient, a Board of Studies consisting of Members of the Council and of the Teaching Staff. The constitution of such Committee or Board, and the period for which its members shall hold office, shall be from time to time determined by the Council.

28. The Committee of Board shall, subject to the control of the Council, superintend and direct the education and examination of students, and all matters of detail in respect to such education and examination.

Lectures and Classes.

29. The lectures and classes shall be open to all members of the Inns of Court, and such other persons as the Council may admit.

30. Students shall be provided with the means of education in the general principles of law, and in the law as practically administered in this country, and for the purpose of such education, systematic instruction shall be given in the following subjects :—

1. Roman Law and Jurisprudence and International Law, Public and Private (Conflict of Laws).
2. Constitutional Law (English and Colonial) and Legal History.
3. Evidence, Procedure (Civil and Criminal), and Criminal Law.
4. English Law and Equity, viz. :—
 - (a) Law of Persons, including :—

{	Marriage and Divorce.
{	Infancy.
{	Lunacy.
{	Corporations.

(b) Law of Real and Personal Property and Conveyancing, including :—

{ Trusts ; Mortgages.
Administration of Assets on Death ; on Dissolution
of Partnerships ; on Winding-up of Companies,
and in Bankruptcy.
Practical Instruction in the preparation of Deeds,
Wills, and Contracts.

(c) Law of Obligations.

{ Contracts.
Torts.
Allied Subjects (implied or quasi contracts)
estoppel, etc.
Commercial Law, with especial reference to Mer-
cantile Documents in daily use, which should be
shown and explained.

Staff of Teachers and Mode of Teaching.

31. There shall be a permanent staff of such a number of Readers, not more than eight as the Council may think expedient ; and such Readers shall give instruction both catechetically and by lectures, in such subjects as shall be directed by the Council.

32. In addition to the Readers there shall be a permanent staff of Assistant Readers for Elementary Classes, but the number of such Assistant Readers and Elementary Classes shall be left to the Council.

33. In addition to the staff of Readers and Assistant Readers the Council shall also have power to engage the services of Lecturers on particular subjects, whether enumerated above or not as they may think fit.

34. Both lectures and classes shall be held throughout the entire year, except during the Legal Vacations, at such place or places as the Council may appoint, but so as not to unduly prefer one Inn to another.

Tenure of Offices as regards Readers, Assistant Readers, and Examiners.

35. All appointments shall be annual.

36. In all cases the holder of the appointment shall be eligible for re-election.

37. To secure systematic instruction, the scheme of the lectures to be given by each Reader and Assistant Reader shall be submitted to, and approved by, the Committee or Board of Studies, at such times and in such manner as the Committee or Board shall direct.

38. Students, in addition to availing themselves of the means of instruction provided by these regulations, are recommended to attend in the Chambers of a Barrister or Pleader for the purpose of studying the practice of the law ; but such attendance shall not be compulsory.

Salaries and Payments.

39. The sum of £500 per annum shall be paid to each of the Readers.

40. The remuneration of the Assistant Readers and Lecturers on particular subjects shall be left to the discretion of the Council.

41. Each student shall pay on admission a sum of five guineas, which shall entitle him so long as he shall be a student to attend all the lectures and classes of all the Readers and Assistant Readers and all examinations which students may be required to pass. The Council shall have power to require payment of additional fees for attendance at the lectures of lecturers on particular subjects appointed under Regulation 33.

The Examinations for Call to the Bar.

42. There shall be four examinations for Calls to the Bar in each year—one before each Term, and in sufficient time to enable the requisite certificates to be granted by the Council before the first day of each Term.

43. No student will receive a certificate of fitness for Call to the Bar unless he passes a satisfactory examination in the following subjects :—

- I. Roman Law.
- II. Constitutional Law (English and Colonial) and Legal History.
- III. Evidence, Procedure (Civil and Criminal), and Criminal Law.
- IV. Such of the other Heads of English Law and Equity mentioned in Rule 30 (4) as may be prescribed by the Council.

44. Students have the option of passing the examination in all or any of the subjects I., II., and III. separately from subject IV., which is reserved for the final examination. A student exercising this option will be required to pass in the subject or subjects taken up separately before presenting himself for the final examination.

45. A student may present himself for examination in all or any of the subjects I., II., and III. at any time after admission. Without the special leave of the Council no student shall present himself at the final examination unless he has kept six Terms.

46. If in the final examination a student takes up subjects I., II., and III., or any of them, and fails in such subjects, or any of them, he will not be allowed any credit for answers in subject IV. ; but though he fails in subject IV., he may be allowed a pass in the other subjects, or any of them.

47. A student who presents himself for any examination and whose papers show that he had no reasonable expectation of passing will not be admitted for examination again until the expiration of such time as the Council may direct.

48. In all examinations successful students will be classified according to merit.

49. The Council may, at their discretion, substitute an examination in Hindu and Mahomedan Law, or in Roman Dutch Law, for an examination in English Real and Personal Property, or one of the other subjects mentioned in Rule 30.

50. The Council may accept as an equivalent for the examination in Roman Law—

- i. A degree granted by any University within the British Dominions, for which the qualifying examination included Roman Law ;
- ii. A certificate that any student has passed any such examination, though he may not have taken the degree for which such examination qualifies him :
and
- iii. The Testamur of the Public Examiners for the Degree of Civil Law at Oxford that the student has passed the necessary examination for the Degree of Bachelor of Civil Law ;

Provided the Council is satisfied that the student, before he obtained his degree, or obtained such certificate or testamur, passed a sufficient examination in Roman Law.

51. There shall be a Board of Examiners in each subject, viz. a Reader, with such assistants selected by the Council, not being members of the Staff of Readers and Assistant Readers, as the Council may determine.

52. Examination for Call to the Bar shall be by written papers, and by such *vivâ voce* questions (if any) as the Examiners may think desirable.

53. The Council shall have power to appoint such Assistant Examiners as may be necessary, who shall hold office during the pleasure of the Council.

54. The fee to be paid to each Examiner and Assistant Examiner shall be left to the discretion of the Council.

Honours and Studentships.

55. A student who obtains a first class at the final examination in subject IV., and who, either before or at such examination, passes in subjects I., II., III., will receive a Certificate of Honour.

56. At the Hilary and Trinity Examinations in each year a studentship of one hundred guineas per annum, tenable for three years, will be awarded to the student who passes the best examination in subject IV., and obtains a Certificate of Honour. The Council will not award a studentship if the result of the examination be such as, in their opinion, not to justify the award. Where candidates appear to be equal, or nearly equal, in merit, the Council may divide the studentship between them equally, or in such proportions as they consider just.

57. The expense of these studentships shall be defrayed out of the Common Fund.

58. At every Call to the Bar those students who have obtained studentships or Certificates of Honour will take rank in seniority over all other students called on the same day. Those students who have obtained Certificates of Honour will take rank immediately after the holder of a studentship called on the same day.

59. The Inn of Court to which the holder of any studentship or of any Certificate of Honour belongs, may, if desired, dispense with any Terms, not exceeding two, that may remain to be kept by such student previously to his being called to the Bar.

60. At the Easter and Michaelmas examinations the Council may award to the student who passes the best examination in subject II. (Constitutional Law, English and Colonial, and Legal

History), a special prize of £50, and a similar prize to the student who passes the best examination in subject III. (Evidence, Procedure, Civil and Criminal, and Criminal Law). The Council will not award the prize if the result of the examination be such as in their opinion not to justify the award. Where candidates appear to be equal, or nearly equal, in merit, the Council may divide the prize between them equally, or in such proportions as they consider just.

61. No student will be eligible for a studentship or for a prize who is over twenty-five years of age on the first day of the examination. This limit of age does not apply in the case of honours.

62. A student who has passed the examination in any subject will not be allowed to present himself again for examination in that subject.

63. The examiners shall submit their examination papers to the Committee or Board of Studies, for approval at such time as the Committee or Board shall direct; and the number of marks to be attributed to each paper, shall also be submitted to the Committee or Board for their approval.

64. Previous to each examination the Committee or Board shall give such notice as they shall think fit of the books and branches of subjects in which students will be required to pass at such examination in order to be entitled to a certificate.

65. One examiner at least shall be present during the whole time of the examination in writing.

66. The Board of Examiners shall, after each examination, report the result thereof to the Committee or Board of Studies, who shall submit to the Council the names of those students (if any) who are in their opinion entitled to receive Pass or Honour Certificates or to obtain studentships.

67. All students shall be bound by such variations as may from time to time be made in these regulations.

Common Fund.

68. The four Inns of Court shall continue their annual contributions of three hundred and sixty pounds each towards constituting the Common Fund, to which shall be added the several fees for forms of admission and for attending lectures; and also the several sums of five guineas for each student, to be paid by the Inns of Court respectively, as additional contributions pursuant

to the report of the Committee of the four Inns of Court, dated 6th December, 1871 ; and any further money which may, from time to time, be required to enable the Common Fund to meet the charges on it in any year, shall be contributed by the four Inns of Court at the end of such year, rateably and in proportion to the number of students belonging to the four Inns respectively, who shall in that year have been called to the Bar or have for the first time obtained permission to practise under the Bar.

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